88-1430

No.

Supreme Court, U.S.
FILED
FEB 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNION ASPHALTS and ROADOILS, INC., *et al.*,
Petitioners,

vs.

MO-KAN TEAMSTERS PENSION FUND, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MILLER AND BASH, P.C.
R. W. MILLER
(Counsel of Record)
JAMES B. BETTERMAN
SHERMAN A. BOTTS
4310 Madison Avenue
Kansas City, Missouri 64111
(816) 531-0755
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Are an arbitrator's conclusions of law under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §1381, *et seq.*, subject to *de novo* review or subject to the standard of review as set forth in the Federal Arbitration Act, which is expressly incorporated in MPPAA?

2. What is the proper definition of "building and construction industry" under MPPAA, which is appropriate and tailored to the intent of Congress in creating the building and construction industry exception to withdrawal liability under MPPAA?

3. In light of the Arbitrator's findings of fact that Union Asphalts' operations were related exclusively to the construction industry and controlled by the same factors which controlled the construction industry, is Union Asphalts to be considered in the "building and construction industry" for purposes of an exemption to withdrawal liability under MPPAA?

LIST OF PARTIES

The petitioners in this proceeding are Union Asphalts and Roadoils, Inc., Patricia M. Lorenz, David M. Lorenz, and David Dill. The respondents before this Court include Mo-Kan Teamsters Pension Fund, Karl Rogers, Richard Milone, Robert Gillihan, Gayle D. Starling, Michael Rogers, James Duvall, Richard Knipp, Leo Zahner III, and William W. Weeks, Trustees for the Mo-Kan Teamsters Pension Fund.

TABLE OF CONTENTS

Questions Presented for Review I
List of Parties II
Table of Contents III
Table of Authorities IV
Opinions Below 1
Jurisdiction 2
Statutory Provisions Involved 2
Statement of the Case 6
Reasons for Granting the Writ 12

1. By Concluding That an Arbitrator's Conclusions of Law Under the Multiemployer Pension Plan Amendments Act of 1980 Are Subject to De Novo Review by the Federal Courts, the United States Court of Appeals for the Eighth Circuit Erroneously Rejected This Court's Well-Established Precedent in Favor of Arbitration and Erroneously Ignored the Extremely Limited Standard of Review of an Arbitrator's Conclusions of Law Pursuant to the United States Arbitration Act, Which Is Expressly Incorporated by Reference Into MPPAA 12
2. This Court Should Issue a Writ of Certiorari Concerning the Present Case Because the Eighth Circuit Court of Appeals Has Attempted and Failed to Determine a Clear Definition of the Building and Construction Industry Exception to Withdrawal Liability Under MPPAA Which Is an Important Question of Federal Law That Has Broad Reaching

Impact on the Management of Multiemployer Pension Plans 21

Conclusion 29

Appendix A1

TABLE OF AUTHORITIES

Cases

A. L. Adams Construction Company v. Georgia Power Company, 733 F.2d 853 (11th Cir. 1984) 25

Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc., 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) 18, 19

Connolly v. Pension Benefit Guaranty Corporation, 475 U.S. 211 (1986) 22

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) 12

Drivers Local 695 v. NLRB (Madison Employers Council), 361 F.2d 547 (D.C. Cir. 1966) 25

H. C. Elliott, Inc. v. Carpenters Pension Trust Fund for Northern California, 859 F.2d 808 (9th Cir. 1988) 23

I.A.M. National Pension Fund Benefit Plan C v. Stockton Tri Industries, 727 F.2d 1204 (D.C. Cir. 1984) 20

Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, 762 F.2d 1137 (1st Cir. 1985) (en banc) 18

Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 12, 13

Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1 (1983) 13

National Railroad Passenger Corporation v. Chesapeake and Ohio Railway, 551 F.2d 136 (7th Cir. 1977) 14-15

NLRB v. International Brotherhood of Teamsters Local 294, 342 F.2d 18 (2nd Cir. 1965) 25

Office of Supply, Republic of Korea v. New York Navigation Company, 469 F.2d 377 (2nd Cir. 1972) 15

Pension Benefit Guaranty Corporation v. R. A. Gray & Company, 467 U.S. 717 (1984) 22

Perry v. Thomas, 482 U.S. 483 (1987) 12

Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund, 718 F.2d 628 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984) 17, 18, 19

Shearson/American Express, Inc. v. McMahon, 107 S.Ct. 2332 (1987) 12, 13

Southland Corporation v. Keating, 465 U.S. 1 (1984) 13

Stroh Container Company v. Delphi Industries, Inc., 783 F.2d 743 (8th Cir. 1986), *cert. denied*, 476 U.S. 1141 (1986) 19

Terson Company v. Bakery Drivers and Salesmen Local 194, 739 F.2d 118 (3rd Cir. 1984) 18

Textile Workers Pension Fund v. Standard Dye & Finishing Company, 725 F.2d 843 (2nd Cir. 1984), *cert. denied*, 467 U.S. 1259 (1984) 18

Thomas v. Union Carbide Agricultural Products Company, 473 U.S. 568 (1985) 20

Trustees of the Amalgamated Insurance Fund v. Geltman Industries, Inc., 784 F.2d 926 (9th Cir. 1986), *cert. denied*, 479 U.S. 822 (1986) 19

United Paperworkers International Union v. Misco, Inc., 108 S.Ct. 364 (1987) 12-13

United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn &

McDonnell, 787 F.2d 128 (3rd Cir. 1986), *aff'd by an equally divided court*, 481 U.S. 735 (1987) 15, 16, 18, 20

Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F.2d 1502 (D.C. Cir. 1984) 16, 18, 20

Wilko v. Swan, 346 U.S. 427 (1953) 14

Statutes

Multiemployer Pension Plan Amendments Act of 1980,

29 U.S.C. §1383(b)(1) 3, 6, 22

29 U.S.C. §1401(b)(2), (b)(3) .....*passim*

United States Arbitration Act,

9 U.S.C. §10 .....4, 14, 17

9 U.S.C. §11 .....4, 5, 17

Miscellaneous

H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918 .....6, 23, 25, 27

Note, *Trading Fairness For Efficiency: Constitutionality of the Dispute Resolution Procedures of the Multi-Employer Pension Plan Amendments Act of 1980*, 71 George. L.J. 161 (1982) 20

Pension Plan Guide (CCH) ¶23,678R, at 25,107-29 23-26

No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNION ASPHALTS and ROADOILS, INC., *et al.*,
Petitioners,

vs.

MO-KAN TEAMSTERS PENSION FUND, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 30, 1988.

OPINIONS BELOW

The opinion and award of the arbitrator in the captioned matter is reprinted in the Appendix hereto, *infra*,

p. A1. The opinion of the United States District Court for the Western District of Missouri is reprinted in the Appendix hereto, *infra*, p. A38.

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 857 F.2d 1230 and is reprinted in the Appendix hereto, *infra*, p. A53.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit were entered on September 30, 1988. The order of the Eighth Circuit denying Petitioners' petitions for rehearing and rehearing en banc was entered on November 21, 1988, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1381 et seq.

United States Code, Title 29:

§1383. Complete withdrawal

(a) Determinative factors. For purposes of this part [29 USCS §§1381 et seq.], a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building and construction industry. (1) Notwithstanding subsection (a), in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if—

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the build- and construction industry, and

(B) the plan—

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if—

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer—

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 4041A(a)(2)

[29 USCS §3141a(a)(2)]) [sic], paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

§1401(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings. (1) If no arbitration proceeding has been initiated pursuant to subsection (a), the amounts demanded by the plan sponsor under section 4219(b)(1) [29 USCS §1399(b)(1)] shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 4301 [29 USCS §1451] to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this title, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena [sic] power), and enforced in United States courts as an arbitration proceeding carried out under title 9, United States Code [9 USCS §§1 et seq.]

United States Arbitration Act, 9 U.S.C. §§10-11.

United States Code, Title 9:

§10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made

may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

§11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

STATEMENT OF THE CASE

This dispute arose when the Mo-Kan Teamsters Pension Fund ("Fund") initiated this litigation after demanding that Union Asphalts and Roadoils, Inc. ("Union Asphalts") pay $134,380 in alleged withdrawal liability pursuant to the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208 (codified at 29 U.S.C. §1381 *et seq.*) Under MPPAA, when an employer completely withdraws from a multiemployer pension plan, the employer must pay a sum determined by the particular fund under guidelines set by Congress. However, under certain circumstances, the Act excuses employers in the building and construction industry from withdrawal liability. 29 U.S.C. §1383(b); MPPAA §4203(b). *See* H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1, at 75-76, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2935 [hereinafter *Report*]. For example, an employer in the building and construction industry that goes out of business does not have to pay withdrawal liability to a multiemployer pension plan at that time. *Report, supra*, at 75-76, U.S. Code Cong. and Admin. News at 2943-44.

Union Asphalts was a corporation that was exclusively engaged in supplying and distributing road oils and asphaltic materials which were sold exclusively for

use in road construction and road repair. The materials were manufactured by another company, the Kansas City, Kansas Refinery of Phillips Petroleum Company. None of the materials were manufactured by Union Asphalts. Instead, Union Asphalts supplied, sold and delivered the materials to construction sites within the states of Missouri, Kansas, Nebraska and Iowa. Each of these states had its own specific specifications and the materials were delivered in these respective states under the strict quality standards for each state. If any material did not meet such specific standards, then the material had to be wasted.

Union Asphalts commenced business in the 1940s and continued in business until it was put out of business when its sole source of material, Phillips Petroleum, shut down its refinery in late 1982. When Union Asphalts was thus forced out of business, the Fund determined Union Asphalts owed $134,380 in withdrawal liability. Union Asphalts began making withdrawal liability payments to the Fund under protest and also timely demanded arbitration of the withdrawal liability claim on December 15, 1983. During the course of the arbitration hearing, both parties presented witnesses for direct and cross-examination, submitted documentary evidence, and concluded with oral argument. Subsequent to the arbitration hearing, both parties filed briefs summarizing the factual and legal arguments at issue in this matter.

After careful review of the evidence and argumentative materials in the case, the Arbitrator issued his Opinion and Award on April 24, 1986, in which the Arbitrator held that, in light of the Findings of Fact and Conclusions, substantially all of Union Asphalts' employees performed work in the building and construction industry

and therefore, Union Asphalts was exempt from any withdrawal liability to the Fund. (p. A31, *infra*).

Contained within the Arbitrator's Opinion were several key Findings of Fact that clearly supported the Arbitrator's finding that Union Asphalts performed work in the building and construction industry. Specifically, the Arbitrator found as fact that Union Asphalts was engaged exclusively in the sale, supply and distribution of road oil and asphalt materials (p. A6, *infra*) and that Union Asphalts was not the manufacturer of these materials; instead, that function was performed by another company, Phillips Petroleum Company. (p. A6, *infra*).

The Arbitrator further found as fact that Union Asphalts delivered its asphaltic materials "to a jobsite with respect to every order delivered." (p. A32, *infra*). When these deliveries were made, the Arbitrator found that Union Asphalts was subject to the very same conditions that were imposed on other contractors in the building and construction industry. For example, Union Asphalts could only deliver its materials to the construction sites at those specific times when the state specifications permitted application of the materials, such as when the air and ground temperatures at the sites were above 60°F or 40°F, depending on the material. (p. A8, *infra*). If the surface conditions were wet, then state standards also prevented road contractors from applying asphaltic materials, and Union Asphalts was not permitted to deliver its materials to the site. (p. A8, *infra*). The Arbitrator found as fact that Union Asphalts' "business cycle and daily operations were controlled by the very same factors which controlled road construction." (p. A31, *infra*). Both the road construction site and Union Asphalts' work were controlled by the weather - if the

contractors on the jobsites could not work due to the weather, Union Asphalts' employees could not work. (p. A31, *infra*).

Similarly, in connection with the seasonal changes of the weather, the Arbitrator also found that Union Asphalts' monthly remittance reports to the Fund illustrated that the number of employees working for Union Asphalts in an average August was virtually triple the labor force that worked during an average January. (p. A10, *infra*). Further, the employees typically worked more than six times as many hours in August than they worked in January. (p. A10, *infra*).

Aside from the seasonal characteristics of Union Asphalts' work, which was identical to that of the building and construction industry, the Arbitrator also found as fact that the employees that worked for Union Asphalts typically worked for several different employers during their careers. (p. A31, *infra*). The Arbitrator found that when Union Asphalts required an increased labor force, it went to the union hiring hall, and when lay-offs were necessary, the employees returned to the union hall to seek work with other employers. (p. A8, *infra*).

Competitive bidding was an additional characteristic of Union Asphalts' business that was identical to the building and construction industry. (p. A31, *infra*). The demand for Union Asphalts' services in the area was virtually controlled by its ability to obtain work by successful competitive bidding. (p. A31, *infra*).

In regard to the typical activity of the Union Asphalts' employee, the Arbitrator found as fact that "in the majority of situations [Union Asphalts'] employees delivered [Union Asphalts'] products to road construction jobsites

and, on occasion, they had to off-load product in a piecemeal fashion in order that it could be 'shot off' to a road under construction or repair." (App., p. 275).

Finally, after carefully reviewing the activities and characteristics of Union Asphalts' operation, the Arbitrator concluded as fact that "it is clear that [Union Asphalts'] operation was related solely and exclusively to the road construction industry and was subject to virtually all of building and construction problems. . . In summary, when [Union Asphalts'] operation is viewed as a whole, it is clear that [Union Asphalts] and its employees were *deeply involved* in the road construction industry. . . [R]oad construction and repair was not a miniscule portion of [Union Asphalts'] business; road construction and repair was *all* of [Union Asphalts'] business." (pp. A30-32, *infra*) (emphasis added).

The Arbitrator then extensively reviewed the legislative history of the building and construction exception as set forth in MPPAA and, in light of his Findings of Fact, concluded that Union Asphalts' employees substantially performed work in the building and construction industry. (p. A34, *infra*). Therefore, the Arbitrator found that the Fund's determination of withdrawal liability was "clearly erroneous." (p. A34, *infra*). The Arbitrator directed the Fund to reimburse Union Asphalts the withdrawal payments previously made by Union Asphalts together with interest in accordance with section 6621 of the Internal Revenue Code. (p. A35, *infra*).

The Fund refused to comply with the Arbitrator's order, thus compelling Union Asphalts to file an action in the District Court for the Western District of Missouri to seek enforcement of the Arbitrator's Award. The

Fund also filed an action in which it sought to vacate the Arbitrator's decision. The Fund and Union Asphalts filed cross-motions for summary judgment and the District Court entered its judgment on August 21, 1987. *See* p. A38, *infra*. The District Court ignored the clear findings made by the Arbitrator and held that Union Asphalts did not perform work in the building and construction industry and was, therefore, subject to withdrawal liability under MPPAA. The District Court's decision thus prompted Union Asphalts to timely file its Notice of Appeal on September 18, 1987.

On September 30, 1988, the United States Court of Appeals for the Eighth Circuit affirmed the District Court decision holding Union Asphalts subject to withdrawal liability under MPPAA. *See* p. A53, *infra*. The Court concluded that Union Asphalts' employees did not perform work in the building and construction industry as required under MPPAA. On October 14, 1988, Union Asphalts filed a petition for rehearing and rehearing en banc in the Eighth Circuit Court of Appeals. On November 21, 1988, such petition was denied. *See* p. A64, *infra*.

Union Asphalts requests that this Court review the decision of the Eighth Circuit Court of Appeals to determine the proper standard of review by the federal courts of an arbitrator's conclusions of law under MPPAA as well as the proper definition of the term "building and construction industry" for purposes of an exception to withdrawal liability under MPPAA.

REASONS FOR GRANTING THE WRIT

1. By Concluding That an Arbitrator's Conclusions of Law Under the Multiemployer Pension Plan Amendments Act of 1980 Are Subject to De Novo Review by the Federal Courts, the United States Court of Appeals for the Eighth Circuit Erroneously Rejected This Court's Well-Established Precedent in Favor of Arbitration and Erroneously Ignored the Extremely Limited Standard of Review of an Arbitrator's Conclusions of Law Pursuant to the United States Arbitration Act, Which Is Expressly Incorporated by Reference into MPPAA.

In this case the United States Court of Appeals for the Eighth Circuit ignored the appropriate standard of judicial review of an arbitration conducted pursuant to MPPAA and, as a result, erred as a matter of law in holding that the Court could conduct a de novo review of the arbitrator's decision. In so doing, the Court of Appeals erroneously rejected this Court's precedent in favor of arbitration.

Throughout the years, this Court has continuously reaffirmed its support of a public policy favoring arbitration as a method of dispute resolution and has significantly broadened the scope of, and deference to, arbitration. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express, Inc. v. McMahon*, 107 S.Ct. 2332 (1987); *Perry v. Thomas*, 482 U.S. 483 (1987). The policy of favoring such resolution without Court intervention was most recently recognized in the case of *United Paperworkers*

International Union v. Misco, Inc., 108 S.Ct. 364 (1987), wherein this Court stated:

> The reasons for insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor-management relations. These statutes reflect a decided preference for private settlement of labor disputes without the intervention of government. . . Courts thus do not sit to hear claims of actual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

108 S.Ct. at 370.

This Court has recognized that arbitrators are fully capable of resolving complex factual and legal issues (such as anti-trust claims, 10(b) claims, and RICO claims) and that the procedures of arbitrators do not violate the substantive rights of the parties. *Shearson/American Express, Inc. v. McMahon, supra*, at 2340 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, supra*, at 626-628, 633-634. Thus, there "is a congressional declaration of a liberal federal policy favoring arbitration . . . [and] questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

The Court of Appeals has erroneously ignored the extremely limited standard of review of an arbitrator's conclusions of law pursuant to the United States Arbitration Act, which is expressly incorporated by reference into MPPAA by section 4221(b)(3) [29 U.S.C. §1401(b)(3)] of MPPAA as follows:

> (b)(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 4301 [29 U.S.C. §1451] to enforce, vacate, or modify the arbitrator's award.
>
> (b)(3) Any arbitration proceedings under this section shall, to the extent consistent with this title, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena [sic] power), and *enforced in United States Courts as an arbitration proceeding carried out under* [*the United States Arbitration Act*] *title 9, United States Code* [9 U.S.C. §1 *et seq.*].

29 U.S.C. §1401(b)(2), (b)(3); MPPAA §4221(b)(2), (b)(3) (emphasis added).

The Arbitration Act specifies that an arbitration award may be vacated only on the basis (i) that the award was procured by fraud, corruption, or undue means; (ii) of misconduct on the part of the arbitrator; or (iii) that the arbitrator exceeded his power or imperfectly executed his power. 9 U.S.C. §10. The Fund has never alleged any of these grounds for vacating the arbitrator's award. The Fund has only alleged statutory misinterpretations by the arbitrator of the definition of the "building and construction industry." However, even if there was any misinterpretation (which there was not), this is not a ground for vacating the arbitrator's award under §10 of the Arbitration Act. Furthermore, the law is well-settled that an arbitration award will not be vacated on the ground that an arbitrator misinterpreted applicable law. *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953); *Nat'l*

R.R. Passenger Corp. v. Chesapeake and Ohio Railway, 551 F.2d 136, 143 (7th Cir. 1977); *Office of Supply, Republic of Korea v. New York Navigation Co.*, 469 F.2d 377, 379 (2nd Cir. 1972).

The Eighth Circuit Court of Appeals rejected Union Asphalts' argument and has erroneously held that the Arbitrator's conclusions of law are subject to de novo review by the federal courts. The Court's holding has created a distinct conflict in that two other Courts of Appeal have held that Arbitrator's conclusions of law are not subject to de novo review.

In *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell*, 787 F.2d 128 (3rd Cir. 1986), *aff'd by an equally divided court*, 107 S.Ct. 2171 (1987), the Third Circuit Court of Appeals recognized a very strong policy in favor of deference to an arbitrator's legal conclusions, as follows:

> Most statutory schemes providing for arbitration require reviewing courts to defer to arbitrator's findings, and this is not in itself problematic. In MPPAA, however, this practice is said to perpetuate the insulation of the trustees' putatively biased determination from effective review. We note that §1401 (c) requires the district court to presume the arbitrator's findings of fact correct, and makes no mention of the scope of review of the arbitrator's legal determinations. In light of this court's settled policy of extreme deference to an arbitrator's legal as well as factual determinations, . . . *we do not read this omission as suggesting that the district court has plenary review over the arbitrator's findings of law.* In any event, the trustees' factual determinations and discretionary judgments, which must indisputably be reviewed deferentially in both arbitration and the

> district court, are critical to assessments of withdrawal liability.

Id. at 135 n.9 (emphasis added) (citations omitted).

In *Washington Star Company v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984), the Court of Appeals for the District of Columbia recognized the applicability of the standard of judicial review set forth in the Arbitration Act for purposes of MPPAA:

> Either party may bring an action in a federal district court 'to enforce, vacate, or modify' the arbitrator's award. *Id.* §1401(b)(2). *The court must enforce the arbitrator's decision in accordance with the United States Arbitration Act, 9 U.S.C. §§1-14 (1982), which authorizes only limited review. Id.* §1401(b)(3). Furthermore, the Court must presume that the arbitrator's findings of fact are correct unless they are rebutted by a clear preponderance of the evidence. *Id.* §1401(c).

Id. at 1505 (emphasis added).

This conflict between the Eighth Circuit and the District of Columbia and Third Circuits mandates that this matter be considered by this Court in order to assure uniformity in the review of arbitrator's decisions under MPPAA.

The Court of Appeals has concluded that the review required by the Arbitration Act is inconsistent with MPPAA and the latter prevails. With all due respect to the analysis of the Court of Appeals, Sections 1401(b)(2) and 1401(b)(3) of MPPAA do not conflict since *both* sections require the District Court's review of the

Arbitrator's decision to be controlled by the Federal Arbitration Act. Section 1401(b)(2) does not provide a broad grant of jurisdiction to the federal courts to conduct a de novo review of the arbitrator's decision.

Section 1401(b)(2) of MPPAA provides a grant of jurisdiction which is consistent with the narrow standard of review under the Arbitration Act. (Compare MPPAA Section 1401(b)(2) and Sections 10 and 11 of the Arbitration Act, 9 U.S.C. §§10, 11). Significantly, MPPAA Section 1401(b)(2) uses the same words—"vacate" and "modify"—used by Sections 10 and 11 of the Arbitration Act. Clearly, Section 1401(b)(2) provides that an arbitrator's award is to be "enforced" unless it is "vacated" on one of the grounds specified in Section 10, or "modified" on one of the grounds specified in Section 11 of the United States Arbitration Act.

In reaching its decision, the Court of Appeals relied heavily on *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984), in which the Employer argued that MPPAA was unconstitutional because MPPAA purportedly denied the Employer procedural due process. As part of the constitutional argument, the Employer argued that it could not obtain effective judicial review of an arbitrator's legal rulings. The Fourth Circuit rejected this argument and held as follows:

> The clear authorization of §1401(b)(2) for judicial review 'to enforce, vacate, or modify the arbitrator's award' gives a right to review an arbitrator's rulings. Since 9 U.S.C. §10 is not consistent with §1401(b)(2), the latter prevails.

Id. at 641.

The Court of Appeals' reliance on *Republic* is misplaced since five circuit courts of appeal have rejected constitutional challenges to MPPAA's arbitration provisions without relying on de novo review of the arbitrator's decision.[1] *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Indus. Pension Fund,* 762 F.2d 1137 (1st Cir. 1985) (en banc); *Board of Trustees of the W. Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc.,* 749 F.2d 1396, 1403-04 (9th Cir. 1984), *cert. denied,* 471 U.S. 1054 (1985); *Terson Co. v. Bakery Drivers and Salesmen Local 194,* 739 F.2d 118 (3rd Cir. 1984); *Washington Star Co. v. Int'l Typographical Union Negotiated Pension Plan,* 729 F.2d 1502, 1511 (D.C. Cir. 1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.,* 725 F.2d 843, 854-55 (2nd Cir. 1984).

Secondly, the Fourth Circuit's decision primarily dealt with the constitutionality of MPPAA. *Republic Indus., Inc. v. Teamsters Joint Council No. 83, supra,* at 631. Moreover, in *Republic,* an arbitrator had not rendered a decision for the district court to review. Thus, any reference to the standard of review for a district court in reviewing an arbitrator's award is at best *dicta* and did

---

1. In *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.,* 787 F.2d 128 (3rd Cir. 1986), *aff'd by an equally divided court,* 107 S.Ct. 2171 (1987), the Third Circuit held that §1401(a)(3)(A) of MPPAA was unconstitutional since it deprived withdrawing employers of an impartial tribunal in violation of their procedural due process rights. Under §1401(a)(3)(A), the determinations made by the trustees of a multiemployer pension fund with respect to the withdrawal liability of a withdrawing employer were presumed correct unless the employer could prove by a preponderance of the evidence that the determination was unreasonable or clearly erroneous. This successful constitutional challenge is totally unrelated to the standard of review by a district court of an arbitrator's decision.

not provide the Court of Appeals with meaningful precedent on which to base its decision.

The Court of Appeals' reliance on *Trustees of the Amalgamated Insurance Fund v. Geltman Industries, Inc.*, 784 F.2d 926, 928-29 (9th Cir. 1986), *cert. denied*, 479 U.S. 822 (1986), is also misplaced since the Ninth Circuit relied primarily on the *Republic* decision regarding the standard of review for an arbitrator's decision. Clearly, as discussed above, *Republic* has no precedential value regarding this issue.

The Court of Appeals, like the Ninth Circuit, also relied on *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1405-06 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985), wherein the Ninth Circuit held that §1401 of MPPAA did not unconstitutionally vest judicial functions in persons who lack the tenure and salary protections of Article III of the Constitution since the Ninth Circuit held that the arbitrator's legal conclusions are subject to de novo review by the district court and that the district court thereby retained and exercised the essential attributes of federal judicial power.

Petitioners do not contest the fact that the legal conclusions of the arbitrator are subject to review under the Federal Arbitration Act. *See Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 (8th Cir. 1986), *cert. denied*, 476 U.S. 1141 (1986). However, in the case at hand, the Court of Appeals failed to distinguish between allowing a court to review an arbitrator's legal conclusions under the standard required by the Federal Arbitration Act and the review being a de novo review. A legal review, other than a de novo review, is a sufficient allocation of power to ensure that the reviewing

court retains and exercises the essential attributes of federal judicial power. *See Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985).

Finally, the Court of Appeals' decision is not supported by its reference to footnote 7 of the District of Columbia Circuit Court of Appeals' decision in *I.A.M. National Pension Fund Benefit Plan C v. Stockton Tri Industries*, 727 F.2d 1204 (D.C. Cir. 1984). *See Id.* at 1207 n.7. The District of Columbia Circuit Court of Appeals expressly rejected de novo review of an arbitrator's decision under MPPAA in the *Washington Star* case, *supra*. Two of the three judges who decided the *Stockton* case also decided the *Washington Star* case. Clearly, the position set forth in the main text of the *Washington Star* case prevails over the dicta contained in the *Stockton* footnote. Thus, it was inappropriate for the Court of Appeals to summarily reject the holding in the *Washington Star* case.

Congress clearly and unequivocally, by its express choice of words, intended to and did limit judicial review of an arbitrator's award under MPPAA to the standard of review set forth in the Federal Arbitration Act. The decision by the Court of Appeals in the case at bar contradicts the above-listed rulings in this regard. *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3rd Cir. 1986), *aff'd by an equally divided court*, 481 U.S. 735 (1987); Note, *Trading Fairness For Efficiency: Constitutionality of the Dispute Resolution Procedures of the Multi-Employer Pension Plan Amendments Act of 1980*, 71 George. L.J. 161, 178-179 (1982).

As a matter of public policy, it is misguided to suggest that Congress would require compulsory arbitration of withdrawal liability disputes, yet require the judiciary

to duplicate this effort in the form of a de novo review. To the contrary, the legislative history of MPPAA demonstrates that Congress sought to create an expeditious and economical method of dispute resolution. Congress did not intend to burden the federal courts by requiring them to decide anew every MPPAA dispute that has been the subject of arbitration.

The Court of Appeals has gutted MPPAA and the Federal Arbitration Act, and has rejected this Court's preference for arbitration by requiring de novo review of the Arbitrator's decision under MPPAA. Moreover, Congress has mandated that the Federal Arbitration Act applies, but the Court of Appeals has exhibited a judicial hostility to arbitration by creating an inconsistency between MPPAA and the Federal Arbitration Act when none really exists. As such, the Court of Appeals erred in failing to follow the mandate of Congress as expressed in MPPAA and the mandate of this Court as expressed in these decisions when the Court of Appeals refused to affirm the well-reasoned decision of the Arbitrator.

2. This Court Should Issue a Writ of Certiorari Concerning the Present Case Because the Eighth Circuit Court of Appeals Has Attempted and Failed to Determine a Clear Definition of the Building and Construction Industry Exception to Withdrawal Liability Under MPPAA Which Is an Important Question of Federal Law That Has Broad Reaching Impact on the Management of Multiemployer Pension Plans.

The present case involves an interpretation of the "building and construction industry" exception under the Multiemployer Pension Plan Amendments Act of 1980

("MPPAA"), 29 U.S.C. §1381 *et seq.*, which are amendments to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001 *et seq.*, which this Court recognized was created by Congress to regulate private pension plans. *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 720 (1984). The amendments to ERISA, as provided under MPPAA, were created out of the concern by Congress that individual employers, when they cease doing business and withdraw from multiemployer pension plans, may reduce a plan's contribution base since the remaining employers to the plan may be forced to contribute at a higher rate to make up for the lost contributions of the withdrawing employer. The net effect, before MPPAA was enacted, was that the increased contribution rates imposed upon the remaining employers caused further withdrawals and reduction to the contribution base. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 215 (1986). To prevent this, MPPAA assesses withdrawal liability on the withdrawing employer in order to "cushion the financial impact on the plan." *Id.* at 217 (*quoting* Pension Plan Termination Issues: Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2d Sess. 22 (1978), Statement of Matthew H. Lind, Pension Benefit Guaranty Corp. Executive Director).

Congress also recognized that the withdrawal of employers in certain industries does not pose a threat to the funding base of the plan. Specifically, the building and construction industry was the subject of special attention by Congress when it enacted the "building and construction industry" exception under MPPAA, 29 U.S.C. §1383(b)(1). The exception excuses a construction employer from withdrawal liability providing the employer ceases doing construction work within the jurisdiction

of the collective bargaining agreement. 29 U.S.C. §1383 (b)(2). "This provision was enacted because the construction industry as a whole does not necessarily shrink when a contributing contractor leaves the industry; employees are often dispatched to another contributing contractor." *H. C. Elliott, Inc. v. Carpenters Pension Trust Fund for Northern California,* 859 F.2d 808 (9th Cir. 1988). In other words, in creating MPPAA, Congress was concerned with protecting the funding base of a multiemployer pension plan. However, at the same time it recognized that the cessation of the operations of an employer in the building and construction industry does not pose a threat to the fund and, therefore, Congress created the building and construction industry exception to withdrawal liability. *See Report, supra,* U.S. Code Cong. & Admin. News at 2918.

There is no question that the goal of Congress in creating the building and construction exception is laudable. However, that goal is frustrated by an unfortunate aspect of the MPPAA exception: Congress failed to define the term "building and construction industry". Consequently, employers in this field and pension fund managers are left in a state of uncertainty in determining whether or not withdrawal liability must be imposed on an employer in this field who ceases doing business.

The term "building and construction industry" is most important since its application has such financial significance on not only the withdrawing employer, but also the fund. Even the Pension and Benefit Guaranty Corporation ("PBGC") considers this phrase to be a "critical" term. *See* Pens. Plan Guide (CCH) ¶23,678R, at 25,107-29. In fact, the PBGC expressed that it was necessary to define the "building and construction in-

dustry," because, without such a definition, "plan sponsors may have difficulty determining":

(1) whether their plans are construction plans;

(2) whether an individual employer is a construction employer; and

(3) when a plan or employer, once so classified, ceases to be eligible for the special rules.

Id. The PBGC drafted proposed rulemaking containing a definition but, despite the recognized need for a definition of the building and construction industry, the PBGC then withdrew its attempted rulemaking "because of the difficulty in developing appropriate definitions. . ." *Id.*

Since 1982, when the PBGC attempted to define the industry and withdrew from such an effort, no court or ruling authority has successfully defined this "critical" term with any sense of clarity. The issue remains one of first impression for the courts. The decision of the Eighth Circuit Court of Appeals in the case below represents one more additional attempt to define the industry but, unfortunately, it has resulted in more confusion than clarity.

Thus, it remains for this Court to not only remedy the wrongful withdrawal liability imposed on Union Asphalts, but also to provide the needed guidance to plan sponsors and withdrawing employers in order to preserve the intent of Congress to impose withdrawal liability *only* on those employers whose cessation of business poses a threat to the funding base of the plan. In light of the unquestioned importance of defining the building and construction industry for purposes of MPPAA, this Court is respectfully requested to issue a Writ of Certiorari

in the present case and review the judgment of the Eighth Circuit Court of Appeals.

The trouble in establishing the needed definition of the building and construction industry is precipitated by the legislative history of MPPAA itself because it states that the term "building and construction industry" "be given the same meaning as has developed in the administration of the Taft-Hartley Act." *Report, supra,* U.S. Code Cong. & Admin. News at 2944. On first glance, this criteria would seem to afford an extremely useful guide in determining a clear definition of the industry. However, a closer review of the Taft-Hartley Act reveals that the phrase "construction industry" is referenced in two contradictory provisions, Sections 8(e) and 8(f), and the case law that has developed under each provision defines the industry by different standards. Section 8(e) case law defines the construction industry by limiting the industry to employers whose activities *must take place on the construction site. See Drivers Local 695 v. NLRB (Madison Employers Council)*, 361 F.2d 547 (D.C. Cir. 1966); *NLRB v. International Brotherhood of Teamsters Local 294*, 342 F.2d 18 (2nd Cir. 1965). On the other hand, the case law that defines the building and construction industry under Section 8(f) has rejected the "on-site" limitation to define the industry and has instead looked at the function that the employer performed in the industry. In the case of *A. L. Adams Construction Company v. Georgia Power Company*, 733 F.2d 853 (11th Cir. 1984), the Eleventh Circuit Court of Appeals held that the "on-site" limitation did not define the building and construction industry because it recognized that "some general contractors, which are primarily involved in the construction industry, could never qualify under §8(f)." *Id.* at 854.

The conflict within the Taft-Hartley Act regarding the definition of the industry is obvious and continues to confuse and spread chaos among employers, employees, and the government regulatory agencies.

The Petitioners strongly urge the Court to recognize that a definition of the term for purposes of MPPAA cannot be guided solely by the Taft-Hartley Act, since the administration under the Taft-Hartley Act is not driven toward the goals intended by Congress under MPPAA. The PBGC recognized this problem and questioned whether a definition which was developed under legislation unconnected to the purpose of MPPAA for various reasons is necessarily suitable for the pension insurance system of MPPAA. More importantly, the PBGC recognized that "if the ERISA [MPPAA] definition were linked to that in another law, it would be subject to modification by other agencies and the courts without the involvement of the PBGC." Pens. Plan Guide (CCH), *supra,* at 25,107-29. This significance was lost on the Eighth Circuit Court of Appeals in its decision below.

The legislative history adds its own characteristics of the building and construction industry, and these must be considered in determining a definition of the building and construction industry which is suitable for purposes of MPPAA:

> In the construction industry, the funding base of the plan is the construction projects in the area covered by the collective bargaining agreements through which the plan is maintained. An individual employee will typically work for tens or even hundreds of different employers over his or her working career, and the volume of work for a given employer will often fluctuate greatly from year to year. These

> normal events do not pose an undue threat to a plan as long as contributions are made for whatever work is done in the area. Therefore, the construction industry exception is designed to impose liability only on former contributors that continue to work within the plan's area.

Report, supra, U.S. Code Cong. & Admin. News at 2943.

It is clear that a definition of the building and construction industry must be guided by the intent of Congress in creating the exception to withdrawal liability under MPPAA, i.e., to impose withdrawal only on those employers who pose a threat to the contribution base of the plan. The Eighth Circuit Court of Appeals ignored this intent and the characteristics of the industry set forth in the legislative history under MPPAA. Instead, the Eighth Circuit Court held that "we look to the case law under Section 8(f) of the Taft-Hartley Act, 29 U.S.C. §158(f), which contains the same term." (p. A60, *infra*). Petitioners strongly urge this Court to consider Section 8(f) but also consider the intent of Congress and the characteristics of the business and construction industry as expressed by Congress in creating the building and construction industry under MPPAA.

In this case, the Arbitrator made numerous findings of fact regarding Union Asphalts' operation and he applied the facts to the above-referenced characteristics of the building and construction industry as set forth by Congress:

> [I]n the majority of situations, Union Asphalts' employees delivered [asphaltic] products to road construction job sites and . . . when [Union Asphalts'] operation is viewed as a whole, it is clear that that

operation was related *solely* and *exclusively* to the road construction industry. . . . [Union Asphalts] sold product only to persons or organizations engaged in road construction or repair; it sold to no other persons or organizations. [Union Asphalts'] business cycle and daily operations were controlled by the very same factors which controlled road construction. When weather was too cold or too wet to apply a particular material the Employer could not deliver that material or, to paraphrase one witness' testimony, *when the contractors couldn't work, [Union Asphalts] couldn't work.* Like construction contractors for whom NLRA §8(f) was intended, [Union Asphalts] obtained virtually all of its work by bidding; it therefore needed to know its labor cost in advance. Because of the fluctuation in its business cycle and as found in the Findings of Fact, the number of persons employed by the Employer and the number of hours worked by those employees varied dramatically according to seasons wherein road construction could or could not be done. When the Employer's business approached its seasonal maximums, the Employer needed a readily available source of Drivers to deliver its products, and the Employer sought the help of the Union to obtain those employees. *Also like the construction employers for whom NLRA §8(f) was intended, all of the Employer's employees worked on many projects and at least some of them worked not only for the Employer but for other employers as well.* Finally, the Employer had even agreed with the Union to make a contribution to a fund to promote the construction industry. *In summary, when the Employer's operation is viewed as a whole, it is clear that the Em-*

ployer and its employees were deeply involved in the road construction industry.

(pp. A30-32, *infra*) (emphasis added).

The Eighth Circuit held that Union Asphalts was merely a "supplier" and that it did not disagree with the Arbitrator that Union Asphalts had some of the same characteristics as businesses which are in the building and construction industry. *See* p. A62, *infra*. Nevertheless, the Eighth Circuit ruled that in order to be entitled to the building and construction industry exception under MPPAA, the work must be "*in* the building and construction industry, *not just connected to* that industry." (pp. A62-63, *infra*) (emphasis added). In short, the only thing the Eighth Circuit Court of Appeals has done to define the building and construction industry is to declare that an employer must be "in" the industry rather than just "connected to" the industry. The distinction between these prepositions is extremely slight and certainly contains no regard for the congressional intent in creating the exception to MPPAA withdrawal liability.

CONCLUSION

Not only are the Petitioners adversely affected by the Eighth Circuit Court of Appeals' decision, but also the net effect of the decision is that it perpetuates the confusion that abounds for all employers and plan sponsors in defining the building and construction industry exception. The need for a precise definition of the building and construction industry is very apparent. Furthermore, this Court's favorable policy toward arbitration

mandates consideration of the deference to be given arbitrators' legal conclusions. Accordingly, the Petitioners respectfully request this Court to issue a Writ of Certiorari and review the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

MILLER AND BASH, P.C.
R. W. MILLER
(Counsel of Record)
JAMES B. BETTERMAN
SHERMAN A. BOTTS
4310 Madison Avenue
Kansas City, Missouri 64111
(816) 531-0755
Attorneys for Petitioners

APPENDIX

(April 24, 1986)

IN THE
MATTER OF THE ARBITRATION
BETWEEN
UNION ASPHALTS AND ROAD OILS, INC.,
AND
MO-KAN TEAMSTERS PENSION FUND

AAA CASE NO.: 57 621 0004 84
SUBJECT: Withdrawal Liability
ARBITRATOR'S FILE NO.: 1984-509

OPINION AND AWARD

ARBITRATOR: Jack Clarke
AWARD DATE: April 24, 1986

APPEARANCES FOR THE PARTIES

EMPLOYER

Richard W. Miller, Esq., Miller & Bash, P.C., Kansas City, MO
James B. Betterman, Esq., Miller & Bash, P.C., Kansas City, MO
Sherman A. Botts, Esq., Miller & Bash, P.C., Kansas City, MO
David L. Lorenz, Vice-President

FUND

Albert J. Yonke, Esq., Yonke, Shackelford & Arnold, P.C., Kansas City, MO
Richard Milone, Sr., Trustee
James Duvall, Trustee

PROCEDURAL HISTORY

Union Asphalts and Road Oils, Inc. is herein referred to as "Employer." Mo-Kan Teamsters Pension Fund is herein referred to as "Fund."

The Fund determined that the Employer owed the Fund withdrawal liability in the amount of $134,380.00.[1] The Employer demanded arbitration of the withdrawal liability claim under cover of a letter from its counsel, Richard W. Miller, Esq., dated December 15, 1983. The parties subsequently submitted determination of the dispute to arbitration in accordance with the Multiemployer Pension Plan Arbitration Rules of the American Arbitration Association.[2] Using the services of the Kansas City, Missouri Regional Office of the American Arbitration Association (hereinafter "AAA"), Jack Clarke was appointed as Arbitrator.

The Arbitrator accepted the appointment by letter to Neil Moldenhauer, AAA Kansas City, Missouri Regional Director, dated 20 December 1984 wherein the Arbitrator wrote:

> Assuming that the plan sponsor involved in the above referenced case has obtained fiduciary liability insurance with adequate limits for the trustees, I would expect that policy being endorsed to cover me as an additional named insured for fiduciary liability arising out of this one particular case.

---

1. The Fund initially claimed the amount of withdrawal liability due to be $168,400.00 and subsequently reduced its claim to $134,380.00.

2. The full title of the rules under which the present arbitration was heard is "Multiemployer Pension Plan Arbitration Rules Sponsored by the International Foundation of Employee Benefit Plans effective June 1, 1981." Those rules are administered by the American Arbitration Association. Those rules will hereinafter be referred to as "IFEBP/AAA Rules."

In letters from Miller to Moldenhauer dated January 14 and 27, 1985 and February 5, 1985 the Employer objected to Clarke's appointment as Arbitrator and requested that that appointment be revoked and that an impartial arbitrator be appointed. Miller argued that Clarke's considering himself a fiduciary and requesting coverage under the Fund's liability policy evidenced Clarke's having prejudged the case and constituted Clarke's placing himself in the same category as a trustee without the impartiality necessary. Miller referred to *UAW v. Greyhound Lines, Inc.*, 701 F.2d 1181 (6th Cir. 1983), which Clarke had referred to in his letter of 20 December 1984. The AAA did not rescind Clarke's appointment as Arbitrator.

An arbitration hearing was held in the offices of the AAA Kansas City, Missouri Regional Office on June 4 and 5, 1985. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument.

At the outset of the arbitration hearing the Fund renewed its objection to Clarke's appointment as Arbitrator. Treating the Fund's objection as a request or motion that the Arbitrator recuse himself, the Arbitrator denied that request. The Arbitrator then stated and here reaffirms that he does not consider himself to be in the same category as a trustee but rather considers his role to be that of an arbitrator hearing and deciding a specific dispute. The Arbitrator recognizes that his role is to be "similar to that of a judge applying applicable law to the facts presented."[3] It is not necessary at this

3. 126 Cong. Rec. H7899 (daily ed. August 25, 1980) (Statement of Rep. Thompson), *reprinted in ERISA, Text of the Law as Amended Through 1982* 125 (K. Gill ed. 1984).

point to discuss in detail the potential for an arbitrator's being deemed a fiduciary within the meaning of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA")[4] § 3(21) for the purpose of being deemed subject to fiduciary liability. It is sufficient to note that prudence counsels an arbitrator hearing a withdrawal liability case pursuant to the Multiemployer Pension Plan Amendments Act (hereinafter "MPPAA")[5] to consider the possibility. When the Arbitrator wrote his 20 December 1984 letter the only avenue known to him whereby he could obtain appropriate insurance was by endorsement of an existing liability policy providing fiduciary liability coverage for trustees. The Arbitrator can fully understand the Employer's concern in light of the Arbitrator's request. But the Arbitrator's request was not motivated by any misunderstanding of the Arbitrator's role. On the contrary, the Arbitrator's request should be viewed as motivated by a desire to free himself to the extent possible of any concerns (such as the avoidance of potential personal liability) which might affect the Arbitrator's objectivity in hearing and resolving the dispute before him. It is not appropriate at this point to discuss *Greyhound Lines, Inc.* in detail. It is sufficient to note that that case does not represent the law of the land and that its underlying facts are unrelated to arbitration of withdrawal liability under MPPAA. If the Arbitrator's having requested that the Fund provide coverage rather than having requested that the Fund and the Employer somehow work out insurance coverage for the Arbitrator caused the Employer's concern, the Arbitrator

---

4. Pub. L. No. 93-406, 88 Stat. 829.

5. Pub. L. No. 96-364, 94 Stat. 1208. MPPAA amended ERISA. Hereinafter citations to MPPAA provisions will be to ERISA, as amended.

expresses his regret. If the Employer desires it may, of course, request that any expense incurred by the Fund in providing insurance coverage to the Arbitrator be equally shared by the Employer.

The parties elected to file post hearing briefs. After extensions of deadlines for submission of briefs were granted, the following briefs were received bearing timely postmarks: Brief For Employer; Brief of Mo-Kan Teamsters Pension Fund; and Reply Brief for Employer. The Arbitrator received the last brief on March 12, 1986.[6]

A shorthand record and verbatim transcript of the arbitration hearing were prepared by or under the direction of Dorothy C. Parker, Certified Shorthand Reporter. The Arbitrator received the transcript on July 3, 1985.

FINDINGS OF FACT

Undisputed relevant facts including facts based on uncontradicted testimony are hereinafter set out with little or no discussion. Where, however, relevant evidence conflicted regarding pertinent facts, that evidence has been briefly summarized prior to the Arbitrator's setting forth any finding of fact based on that evidence. Because of the Arbitrator's determination set out in the Conclusions hereinafter that the building and construction industry exception set out in ERISA § 4203(b) applies, the Arbitrator has largely refrained from summarizing facts and evidence relevant only to other issues specifically including the issue of whether the Fund's determination of its unfunded vested benefits for any

6. The Arbitrator received an Amended Reply Brief from the Employer on March 17, 1986. The amendments consisted solely of corrections of typographical errors.

year was in the aggregate unreasonable. It is sufficient to note that Michael Bollin, Actuary with William M. Mercer-Meidinger, Inc., testified for the Employer that in his opinion the Fund's determination of its unfunded vested benefits on which the withdrawal liability claimed against the Employer was based was in the aggregate unreasonable and that Lall Bachan, Actuary with Martin Segal Co., testified for the Fund to a contrary opinion.

The Employer is a corporation. Beginning sometime in the 1940's the Employer engaged in the business of distributing road oils and asphalt materials. The Employer continued in that business until approximately 1982. Throughout that time the Employer obtained materials from the Kansas City, Kansas Refinery of Phillips Petroleum Company (hereinafter "Phillips") and sold them within the states of Kansas, Missouri, Iowa and Nebraska. The Employer was the exclusive seller of road oils and asphalt cements manufactured by Phillips at its Kansas City refinery. Materials sold were usually delivered to purchasers in tank trucks driven by the employees of the Employer. In some cases deliveries were made by common carrier.

The Fund is a "multiemployer plan" within the meaning of ERISA § 3(37)(A). In accordance with a stipulation between the Employer and the Fund the Arbitrator finds that at all times pertinent to the present arbitration the Fund primarily covered employees in the building and construction industry.[7]

---

7. In Mo-Kan Teamsters Pension Fund v. Creason, No. 76-228-C2, slip op. (D. Kan. April 16, 1985), *aff'd* 716 F.2d 772 (10th Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984), the court found the Fund was established on October 13, 1969 pursuant to a collective bargaining agreement between the Builders' Association of Kansas City, Missouri and Local Union No. 541, affiliated with the International Brotherhood of Teamsters.

The Employer and Local Union No. 541, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Independent (hereinafter "Union") entered into a series of collective bargaining agreements dating back to at least April 1, 1959. Two such contracts were placed into evidence. The first was effective from April 1, 1959 to March 31, 1962 (hereinafter "1959 Agreement"), and the other was effective by its own terms from April 1, 1979 to March 31, 1982 and was extended to expire March 31, 1983 (hereinafter "1979 Agreement"). Both agreements recognized the Union as the exclusive bargaining agent for the Company's employees. The 1959 Agreement defined employees as including anyone employed as a Driver or Distributor-Operator; the 1979 Agreement includes not only Drivers and Distributor-Operators but also Mechanics as employees. Both agreements (and presumably all intervening agreements) required that the Employer pay specified amounts into a designated pension fund. The Fund was the pension fund designated in the 1979 Agreement.

Article XI "Fringe Benefits," section 3 of the 1979 Agreement required the Employer to pay a designated amount per hour worked by each employee covered by the Agreement to a named bank to be paid over "into the Building Industry Advancement Fund to be administered by a Committee appointed by the Association termed the 'Builders' Association Industry Advancement Committee'." Article XI, section 3 further provides:

> This Fund is created in general to train and improve the efficiency of workmen and to improve conditions and relationships of the industry as a whole, and to enter into any other undertaking whatsoever that will serve to advance and promote the building industry.

The 1959 and 1979 Agreements contain seniority provisions which provide, among other things, in effect that layoffs and recalls from layoff will be effected in accordance with seniority and that an employee's seniority shall be continued for 12 months from the date of his or her layoff except in cases of proven sickness.

Testimonies regarding the Employer's hiring and recall practices were not entirely consistent. But the evidence persuades the Arbitrator and the Arbitrator finds that although the Employer and Union had not entered into a "hiring hall" arrangement, when the Employer needed Drivers in excess of those whom it could obtain by recalling laid off Drivers, the Employer called the Union to provide additional Drivers, and the Union provided additional Drivers. When laid off some of the Employer's Drivers returned to other jobs while at least some others went to the Union hall to seek additional work.

For approximately 10 or 15 years before 1982 the only products handled by the Employer were three types of road oil, various grades of asphalt cement, and an emulsion product which utilized water instead of the lighter ends of petroleum refining. The products were sold exclusively for use in road construction and road repair. The products had to meet quality standards of the various states. Particular products could not be placed and therefore could not be delivered when air and/or ground temperatures exceeded certain limits, typically not below 40°F and regarding some products not below 60°F. Products could not be laid down and therefore could not be delivered when the surfaces on which they were to be placed were wet. At least occasionally product delivered by the Employer was tested by a state

inspector at the Phillips refinery and then sealed and not unsealed until the truck reached the delivery point.

David L. Lorenz, Employer Vice-President, testified that the Employer generally obtained orders for products from states, other governmental agencies and contractors by successfully bidding; that the Employer had sold products to over 100 and perhaps 150 contractors in its four state area; and that the Employer's business fluctuated greatly with seasons and was tied to the road construction industry. Another witness testified that when the contractors couldn't work, the Employer's employees couldn't work. The Employer submitted monthly remittance reports for the purpose of showing sums owed by it for fringe benefit programs provided for in its collective bargaining agreements with the Union. Those reports for the months from April 1970 to December 1982 were admitted into evidence. Examining the months of January and August as typical mid-winter and mid-summer months respectively, the remittance reports show the following data from 1982 to 1971.

	JANUARY		AUGUST	
	Number of Employees	Number of Hours	Number of Employees	Number of Hours
1982	5	517	10	1432.75
1981	7	599	13	1995.25
1980	7	713	14	2659
1979	6	746	16	3246
1978	7	733	24	5119
1977	6	685	23	4139
1976	6	613	22	4280
1975	7	697	20	3724
1974	5	356	21	3985
1973	7	701	24	4284
1972	9	604	20	4172
1971	4	88	22	5049
TOTALS	76	7079	229	44085

Averaging the totals shown in the four columns for the 12 years shows that in January on the average the Employer employed 6.33 persons who worked a total of 591 hours, that is, 93.32 hours per person and that in August on the average the Employer employed 19.083 persons who worked 3,673.75 hours or, an average of 192.51 hours per person. That employees on the average were in January working less than full-time and in August overtime is virtually self-evident. In an average August the Employer employed more than three times the number of persons it did in an average January. In an average August the Employer's employees worked more than six times as many hours as they did in an average January. The data contained in monthly written remit-

tance reports as well as the testimonies of Employer and Fund witnesses persuades the Arbitrator and the Arbitrator finds that the Employer's business whether measured by number of employees or hours worked varied greatly with the seasons and the demand for and ability to lay road oils and asphalt cements.[8]

A Driver's regular workday routine consisted of reporting to an Employer office near the Phillips refinery, obtaining a bill of lading, proceeding to the refinery where Phillips' employees blended the appropriate product or directed the Employer's Driver to a spout where that product was already mixed, received a load into his truck, and drove the load to its delivery point where he delivered it. Some deliveries were of a relatively short distance whereas others were considerably longer. But if time permitted, a Driver returned to the Employer's office and repeated the process for another load.

Product was delivered either to individual road construction or road repair job sites or to asphalt plants operated by one or another of the states. Testimonies regarding the frequency with which deliveries were made to job sites or asphalt plants was not entirely consistent, but the Arbitrator is persuaded and finds that the Employer's employees usually delivered product to job sites.

At delivery points the Employer's employees discharged their loads into tanks or other receiving vessels. Occasionally they discharged road oils into spreading devices. On those occasions they would have to discharge their load in parts because the spreading devices could not accommodate an entire truck or tank load. After

---

8. In its reply brief the Employer stated that three of the Company's employees were Mechanics and that those employees were retained through the winter months.

the spreading device "shot off" its capacity, it would return to the Employer vehicle and be reloaded. In discharging their loads, the Employer's employees were responsible only for operating equipments on their trucks and tractors and doing paper work; they did not engage in spreading road oil or asphalt on any highway or in any other way engage in actual road construction or repair.

The Phillips refinery closed in approximately June 1982. Despite its best efforts the Employer was unable to obtain another source of road oils and asphalt cement and was unable to find another use for its trucks. The Employer therefore sold its trucks at auction and ceased doing business. On its December 1982 monthly remittance report the Employer placed an X in a box opposite "Final Report" and there typed "Business Closed." In a report to the Union regarding payment of check-off for the Employer's employees there was written: "Our business will be closing 12/31/82."

As indicated in the Procedural History the Fund claimed the Employer owed withdrawal liability in the amount of $134,380.00 and demanded payment of same. Without waiving any right to object to the Fund's claim the Employer made quarterly payments in accordance with the Fund's demand.

POSITIONS OF THE PARTIES

EMPLOYER

At the commencement of the arbitration hearing the Employer through its counsel alleged that MPPAA was unconstitutional in that it deprived the Employer of due process and trial by jury and presumed that the Fund had acted correctly.

The Employer contends that it owes no withdrawal liability because the Trustees of the Fund did not perform conditions precedent for assessing withdrawal liability.[9]

The Employer contends that in accordance with ERISA § 4203(b) it is exempt from withdrawal liability because it performed work exclusively in the building and construction industry.

The Employer contends that the test to determine whether an employer is entitled to the building and construction industry exemption set forth in ERISA § 4203 (b) is a three part test set out in a report of the House of Representatives Committee on Education and Labor.[10]

The Employer contends that MPPAA was a major undertaking which serves to protect pensions for over eight million employees.[11] The Employer contends that a statute of such significance "merits its own statutory construction and definition of key terms, consistent with its statutory language and the Congressional intent." The Employer contends that the "on job site test" does not define the building and construction industry but only defines one aspect of that industry.

---

9. Fulton & Sons, Inc. v. New England Teamsters Pension Fund, 6 EBC 641 (1st Cir. 1985) (*en banc*); Central States Pension Fund v. Central Transport, Inc., U.S. , 6 EBC 1665 (1985); Buy-Low of Cassopolis, Inc. v. Board of Trustees, Food Workers' Pension Fund, 5 EBC 2641 (1984) (Bowles, Arb.).

10. H.R. Rep. No. 869, 96th Cong., 2d Sess., Part I 75, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2943-44. *See also* Ford, *Withdrawal Liability Under ERISA After the Multiemployer Pension Plan Amendments Act of 1980*, 39 Inst. on Fed. Tax'n § 10.02[4] (Supp.).

11. 126 Cong. Rec. S10099 (daily ed. July 29, 1980); Peick v. Pension Benefit Guaranty Corp., 539 F. Supp. 1025 (N.D. Ill. 1982), *aff'd* 724 F.2d 1247 (7th Cir. 1983).

The Employer contends that its operations satisfy the Taft-Hartley Act's[12] definition of building and construction industry.[13]

The Employer contends that only § 8(f)[14] and not § 8(e)[15] of the National Labor Relations Act[16], as amended, uses the phrase "building and construction industry" and that if either section applies, § 8 (f) does so.

The Employer contends that the evidence in the present case establishes that the assumptions and methods used by the Fund's actuary in determining the Employer's withdrawal liability were unreasonable in the aggregate and that the Employer's withdrawal liability must be recalculated using reasonable actuarial assumptions and methods.[17]

The Employer contends that it did not completely withdraw from the Fund until the cessation of its obligation to contribute to the Plan and that that obligation did not cease until at least the termination of the 1979 Agreement as extended.[18]

---

12. Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136 (1947).

13. A.L. Adams Const. Co. v. Georgia Power Co., 733 F.2d 853 (11th Cir. 1984); Operating Engrs. Pension Trust v. Beck Eng'g & Surveying Co., 746 F.2d 557 (9th Cir. 1984).

14. 29 U.S.C. § 158(f).

15. 29 U.S.C. § 158(e).

16. Ch. 372, 49 Stat. 449 (1935), 29 U.S.C. § 151 et seq.

17. Joy Mfg. Co. v. IAM Nat'l Pension Fund Benefit Plan A, 5 EBC 1129 (1984) (Hannan, Arb.); Perkins Trucking Co. v. Local 807 Labor-Management Pension Fund, 4 EBC 1489 (1983) (O'Loughlin, Arb.).

18. IAM Nat'l Pension Fund v. Stockton TRI Industries, 5 EBC 1299 (D.C. Cir. 1984).

The Employer requests the Arbitrator direct the Fund to reimburse it "for all quarterly payments, plus interest, costs and attorney's fees as a result of the arbitrary, capricious, unreasonable and baseless conduct by the Fund."

FUND

The Fund contends that in accordance with ERISA § 4221(a)(3) the Employer must establish by a preponderance of the evidence that determinations in regards to its withdrawal liability were unreasonable or clearly erroneous in the aggregate.[19]

The Fund contends that its Trustees completed all necessary conditions precedent for assessing withdrawal liability against the Employer.[20] The Fund contends that the Employer did not raise the issue of the Fund's Trustees having allegedly failed to satisfy condition precedents until its post hearing brief.

The Fund contends that the Employer was not a construction employer within the definition of ERISA § 4203 because substantially all of the Employer's employees did not perform construction work.[21] The Fund contends that numerous NLRA § 8(e) cases have estab-

---

19. Fulton & Sons, Inc. v. New England Teamsters Pension Fund, 6 EBC 1641 (1st Cir. 1985).

20. Fulton & Sons, Inc. v. New England Teamsters Pension Fund, *supra* footnote 9; Woodward Sand Co. v. Operating Eng'rs Pension Trust, 3 EBC 2351 (1982) (Kaufman, Arb.).

21. Mo-Kan Teamsters Pension Fund v. Creason, 716 F.2d 772 (10th Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984); NLRB v. W.L. Rives Co., 328 F.2d 464 (5th Cir. 1964); Mo-Kan Teamsters Pension Fund v. Creason, No. 76-228-C2, slip op. (D. Kan. April 16, 1981), *aff'd on other grounds*, 716 F.2d 772 (10th Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984); Carpet, Linoleum and Soft Tile Local No. 1247 (Indio Paint), 156 NLRB 951 (1986); Frick Co., 141 NLRB 1204 (1963).

lished that delivery of construction materials even to a job site is not construction.[22]

The Fund contends that it is appropriate to examine the definition of "building and construction industry" under the Davis-Bacon Act, 40 U.S.C. § 276a - 276a-5 at 29 C.F.R. §§ 5.2(i) and (j). The Fund contends that in accordance with those definitions the Employer was clearly not engaged in "building" or "construction".[23]

The Fund contends that the Employer has not established by a preponderance of the evidence that the Trustees could invest all of its assets in single premium annuities and eliminate or reduce the unfunded vested benefits. The Fund further contends that if the Employer had established such a premise, such a method does not in and of itself make the assumptions and methods used by the Fund unreasonable or clearly erroneous in the aggregate.

The Fund contends that its use of a six percent funding interest rate assumption as part of the blended

---

22. Acco Constr. Equip., Inc. v. NLRB, 511 F.2d 848 (9th Cir. 1975); Drivers Local 695 v. NLRB, 361 F.2d 541 (D.C. Cir. 1966); NLRB v. Int'l Bhd. of Teamsters Local 294, 342 F.2d 18 (2d Cir. 1965); NLRB v. W.L. Rives Co., 328 F.2d 464 (5th Cir. 1964); Joint Council of Teamsters No. 42 (California Dump Truck Owners), 248 NLRB 808 (1980); Joint Council of Teamsters No. 42 (Inland Concrete), 225 NLRB 209 (1976); Forest City/Dillon-Tecon Pacific, 209 NLRB 867 (1974), *enforced*, 522 F.2d 1107 (9th Cir. 1975); Teamsters, Local Union No. 631 (Reynolds Electrical), 154 NLRB 67 (1965); Int'l Bhd. of Teamsters, Local 294 (Island Dock), 145 NLRB 484 (1963), *enforced* 342 F.2d 18 (2d Cir. 1965); Teamsters Local Union No. 559 (Connecticut Sand & Stone Corp.), 138 NLRB 532 (1962).

23. Midway Excavators, Inc., WAB No. 81-17 (December 13, 1983).

rate was reasonable.[24] The Fund contends that its use of the blended rate method was not unreasonable or clearly erroneous in the aggregate.[25]

The Fund contends that the Employer has not met the burden of demonstrating by a preponderance of the evidence its claim that the "Segal method" of handling the Aetna contracts was unreasonable and clearly erroneous in the aggregate.[26]

The Fund contends that the Employer ceased all covered operations requiring contributions to the Fund on December 31, 1984 and that that date is the effective date for determining the Employer's withdrawal liability.[27]

---

24. Food Town Stores, Inc. v. Kansas City Area Retail Food Store Employees Pension Fund, AAA Case No. 57, 621 0001 84 (September 26, 1985) (O'Loughlin, Adm.); Eberhard Foods, Inc. v. RSEU Joint Pension Fund, 6 EBC 1961 (1985) (Glover, Arb.); Buy-Low of Cassopolis, Inc. v. Board of Trustees, Food Workers Pension Fund, 5 EBC 2641 (1984) (Bowles, Arb.); Calvert and Youngblood Coal Co. v. UMWA 1950 and 1974 Pension Plans, 5 EBC 2361 (1984) (Polak, Arb.); Penn Textile Corp. v. Textile Workers Pension Fund, 3 EBC 1609 (1982) (Pritzker, Arb.).

25. Ellis v. Construction Laborers Pension Trust, 6 EBC 1161 (1984) (Zimring, Arb.); Joy Mfg. Co. v. IAM Nat'l Pension Fund, 5 EBC 1129 (1984) (Hannan, Arb.); Food Town Stores Inc. v. United Food and Commercial Workers Int'l Union Indus. Pension Fund, AAA Case No. 51 62 0002 83 LE (July 30, 1984) (Weckstein, Arb.).

26. Bassett Constr. Co. v. Trustees of the Centennial State Carpenters Pension Trust Fund, No. 83-F-980 (D. Colo. Feb. 22, 1985); Calvert & Youngblood Coal Co., *supra* footnote 24.

27. Textile Workers Pension Fund v. Standard Dye & Finishing Co., 6 EBC 1562 (S.D. N.Y. 1985); F.H. Cobb Co. v. N.Y.S. Teamsters Conference, 584 F. Supp. 1181 (N.D. N.Y. 1984); Speckman v. Barford Chevrolet Co., 3 EBC 1245 (E.D. Mo. 1982); UMW 1974 Pension Plan v. Williamson Shaft Constructing Co., 6 EBC 1593 (1985) (Pretzer, Arb.); Coal Drilling Service, Inc. v. UMW 1974 Pension Plan, 5 EBC 183 (1984) (Polak, Arb.).

The Fund requests the Arbitrator affirm the Fund's determination of the Employer's withdrawal liability in the amount of $134,380.00 and direct the Employer to pay same in accordance with the schedule of payments plus interest on unpaid installments and further direct the Employer to pay the costs of arbitration including the Arbitrator's fees and reasonable attorneys' fees to be determined in accordance with ERISA § 4221(a)(2).

CONCLUSIONS

CONSTITUTIONALITY OF MPPAA

Despite the reference in MPPAA's legislative history referred to in the Procedural History that the role of an arbitrator hearing and deciding a withdrawal liability dispute in accordance with MPPAA is similar to that of a judge, there are significant differences between the powers of arbitrators and Federal judges. Especially important in the present case are the sources of decision making authority. A Federal judge's power to decide appropriate cases is ultimately rooted in article III of the United States Constitution, of course. An arbitrator's power in a MPPAA withdrawal case flows from MPPAA itself—specifically from ERISA § 4221, however.

In presenting to the Arbitrator its claim that MPPAA's dispute resolution techniques are unconstitutional, the Employer was in effect asking this Arbitrator to determine that the statute which provides the Arbitrator with his power to make any decision in this case is unconstitutional. The Arbitrator is of the opinion and finds, however, that while he has power to decide the case, he lacks the power to determine the constitutionality of MPPAA or any provision thereof. Professor Davis' comments regarding the power of an administrative agency

to determine the constitutionality of its underlying statute applies to the power of this Arbitrator to determine the constitutionality of MPPAA's dispute resolution techniques:

> [W]e do not commit to administrative agencies the power to determine the constitutionality of legislation. Only the courts have authority to take action which runs counter to the expressed will of the legislative body.[28]

In summary the Arbitrator finds that he lacks the power to determine whether the dispute resolution techniques of MPPAA are unconstitutional.

BUILDING AND CONSTRUCTION INDUSTRY EXCEPTION

ERISA § 4203 provides in part:

> (b)(1) Notwithstanding subsection (a), in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if—
>
> (A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

---

28. K. Davis, *Administrative Law Text* § 20.04 (3rd ed. 1972). *See* Public Utilities Commission v. United States, 355 U.S. 534, 539 (1958); Republic Industries v. Central Pa. Teamsters Pension Fund, 693 F.2d 290, 295 (3rd Cir. 1982); B. Schwartz, *Administrative Law* § 178 (1976); *see also* L. Jaffe, Judicial Control of Administrative Action 438-40 (abridged student ed. 1965); *cf.* F. Cooper, 2 State Administrative Law 579 (1965).

(B) the plan—

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if—

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer—

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

The parties stipulated that the requirement of ERISA § 4203(b)(1)(B)(i), that is, that the Plan primarily covers employees in the building and construction industry, was satisfied in the present case. And despite the Employer's contention that if the building and construction industry exception does not apply, then the Employer did not withdraw from the Fund until sometime after December 31, 1982, it is really undisputed that if the building and construction exception does apply, no withdrawal has occurred in accordance with ERISA § 4203(b)(2). It is undisputed that the Employer ceased to have an obligation to contribute to the extent that it did not pay employees per the 1979 Agreement after December 31, 1982; that the Employer has not performed work within the jurisdiction

of the 1979 Agreement of the type for which contributions were previously required subsequent to December 31, 1982; and that there is no expectancy that it will resume such work. As a consequence of ERISA § 4203(b)(1) if substantially all the employees with respect to whom the Employer had an obligation to contribute to the Fund performed work "in the building and construction industry" the Employer has not effected a complete withdrawal from the Fund.

The phrase "building and construction industry" is not defined in ERISA, as amended by MPPAA. But the legislative history of MPPAA is replete with references to Congress' rationale for creating the exception.[29] Perhaps the most detailed explanation of Congress' rationale is that contained in the explanation of provisions of the building and construction industry exception provided by the House of Representatives Committee on Education and Labor and relied upon by the Employer as a separate test. The Committee wrote:

> In the construction industry, the funding base of the plan is the construction projects in the area covered by the collective bargaining agreements through which the plan is maintained. An individual employee will typically work for tens or even hundreds of different employers over his or her working career, and the volume of work for a given employer will often fluctuate greatly from year to year. These

---

29. *See e.g.*, Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076 The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 13-14 (Comm. Print 1980); H.R. Rep. No. 869 Part I, 96th Cong., 2d Sess. 67-68, 75-76 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 2918, 2935-36, 2943-44; 126 Cong. Rec. H3947, 3949 (daily ed. May 21, 1980) (statement of Rep. Thompson extended by insertion of a more detailed statement).

> normal events do not pose an undue threat to a plan as long as contributions are made for whatever work is done in the area. Therefore, the construction industry exception is designated to impose liability only on former contributors that continue to work within the plan's area. It exempts from liability employers that cease contributions because they have no work in the area; there is no liability when a company goes out of business, is sold, or is simply without work for a time. Also, under this exception, an employer who comes into an area to do one project and then leaves would not be subject to liability.[30]

Despite the absence of any doubt regarding Congress' rationale in enacting the building and construction exception, the Arbitrator must reject the Employer's argument that that rationale constitutes an independent test whereby one may determine if the building and construction exception to complete withdrawal set out in ERISA § 4203 (b) applies. Although Congress did not define "building and construction industry" in enacting MPPAA, the legislative history of that Act clearly shows that Congress intended that the phrase be interpreted in MPPAA applications as it had been interpreted under earlier statutes regulating private sector labor-management relations. Speaking of the building and construction industry exception the House of Representatives Committee on Education and Labor wrote: "In applying this exception, the committee intends that the term 'building and construction industry' be given the same meaning as has developed in administration of the Taft-Hartley Act."[31] In discussing

---

30. H.R. Rep. 869 Part I, 96th Congress 2d Sess. 75-76 (1980), *reprinted in* U.S. Code Cong. & Ad. News 2943-44.

31. *Id.* at 76; U.S. Code Cong. & Ad. News 2944.

S. 1076, a bill which contained a virtually identical exception for the building and construction industry as that eventually enacted into law as MPPAA, the Senate Committee on Labor and Human Resources wrote: "The PBGC and plan sponsor should refer to labor-management relations law guidance in defining 'building and construction industry.'"[32] In short, legislative history leaves no doubt but that Congress intended that the phrase "building and construction industry" be interpreted as it had been in labor-management relations law.

Another and perhaps more persuasive reason for rejecting the Employer's argument that Congress intended its rationale for enacting the building and construction industry to constitute a separate test can be found in the very same section of ERISA where Congress placed the building and construction exception. ERISA § 4203(c) established an exception for the entertainment industry similar to that provided the building and construction industry. In ERISA § 4203(f) Congress authorized the Pension Benefit Guaranty Corporation (PBGC) to prescribe regulations under which plans and industries other than construction or entertainment could be amended to provide for special liability rules similar to those afforded those industries in subsections (b) and (c) of ERISA § 4203. But Congress made clear in ERISA § 4203(f)(2) that those regulations could relate only to industries or portions of industries having the characteristics of the building and construction and entertainment industries relevant to withdrawal liability. In other words, by affording the PBGC the right to extend the building and

---

32. Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076 The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration Fourteen (Comm. Print 1980).

construction and entertainment industry exceptions to industries wherein the Congressional rationale would apply, Congress has clearly indicated that the statute itself does not extend those exceptions beyond those industries.

The reference in MPPAA's legislative history to the Taft-Hartley Act coupled with the other reference to "labor-management relations law" strongly evidences Congress' intention that the phrase "building and construction industry" be interpreted in accordance with statutes regulating private sector labor-management relations in this country. Neither in his own research nor in any post hearing brief submitted in the present case has the Arbitrator uncovered any reference to legislative history which would suggest that Congress intended the phrase "building and construction industry" to be interpreted in accordance with the Davis-Bacon Act which relates to federal contractors' labor relations.

The Taft-Hartley Act amended the National Labor Relations Act (hereinafter "NLRA") which was subsequently further amended by the Labor-Management Reporting and Disclosure Act of 1959.[33] The latter statute amended the NLRA by adding §§ 8(e) and 8(f). The phrase "construction industry" appears in § 8(e), and the phrase "building and construction industry" appears in § 8(f). In view of Congress' intention that the phrase "building and construction industry" in ERISA § 4203(b) be interpreted consistently with private sector labor-management relations law, the Arbitrator concludes and finds that that phrase should be interpreted in accordance with § 8(e) or § 8(f) of the NLRA. Lest there be any confusion regarding the Arbitrator's conclusion, the Arbitrator will here state that as explained below,

---

33. Pub. L. 86-257, 73 Stat. 519 (1959).

the Arbitrator finds that the phrase "building and construction industry" in ERISA § 4203(b) should be interpreted as that phrase has been used in NLRA § 8(f) and not as the phrase "construction industry" in NLRA § 8(e) has been interpreted.

Probably the most obvious expression of Congress' intention that the building and construction industry exception in MPPAA be interpreted consistently with NLRA § 8(f) and not § 8(e) is Congress' choice of the phrase "building and construction industry" rather than "construction industry" in ERISA § 4203(b).

The Arbitrator's conclusion that Congress intended that the phrase "building and construction industry" in ERISA § 4203(b) be interpreted consistently with NLRA § 8(f) need not rest solely on Congress' choice of one phrase over the other, however. In this regard it is important to point out that if Congress had intended that the NLRA § 8(e) interpretation be applied, the Arbitrator would unhesitatingly find that substantially all of the Employer's employees for whom the Employer had been making contributions to the Fund had not been working in the building and construction industry. Numerous decisions of the National Labor Relations Board (hereinafter "Board") have held that an employer who supplies materials to a construction job site is not in the construction industry within the meaning of NLRA § 8(e).[34] But a closer reading of those cases shows that they are founded on legislative history unique to NLRA § 8(e). In the leading *Island Dock* decision[35] the Board

---

34. See the cases cited by the Fund at footnote 22 above.

35. Because the only objection made to the Trial Examiner's Intermediate Report in *Connecticut Sand and Stone Corp.* case related to the Trial Examiner's Recommended Order, the Board approved the Trial Examiner's Findings and Conclusions *pro forma*.

concluded that the mixing and delivery of ready-mix concrete at construction sites was not construction work but was the delivery of a material or product. But the Board clearly founded its decision on the legislative history underlying NLRA § 8(e). The Board wrote:

> The House Conference Report on the 1959 amendments to the Act states with respect to the construction industry proviso:
>
> > The proviso does not exempt Section 8(e) agreements relating to supplies and materials or other products shipped or otherwise transported to and delivered on the site of the construction.[36]

The same legislative history was cited by the Second Circuit when it enforced the Board's order in *NLRB v. International Brotherhood of Teamsters Local 294*, *supra* footnote 22. More recently the Board again referred to the same unique legislative history underlying NLRA § 8(e) in *Joint Council of Teamsters No. 42 (California Dump Truck Owners)*, *supra* footnote 22. The Board there quoted the same sentence quoted in *Island Dock* and the preceding sentence which shows that NLRA § 8 (e) was intended to apply exclusively to work done at a construction site.

> In this regard the House Conference report stated only that:
>
> > It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site

---

36. Island Dock, *supra* footnote 22, at 491 quoting from H.R. Rep. No. 1147, 86 Cong., 1st Sess. 39, *reprinted in* 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 943 (1959).

> of the construction. The proviso does not exempt from Section 8(e) agreements relating to supplies and materials or other products shipped or otherwise transported to, and delivered, on the site of construction.[37]

In short, the legislative history of NLRA § 8(e) clearly evidences Congress' intention that the construction proviso in that section not apply to suppliers such as the Employer in the present case, and the Board has consistently interpreted NLRA § 8(e) in accordance with that unique legislative history.

But, so far as the Arbitrator is aware, Congress did not express any intention to exclude suppliers such as the Employer from the application of the building and construction industry exception in NLRA § 8(f). In this regard it is worthwhile to compare the discussions of § 8(e) and 8(f) in the House Conference report cited by the Board in *Island Dock* and *California Dump Truck Owners*. Noticeably absent from the discussion regarding what later became NLRA § 8(f) is language comparable to that quoted by the Board in *Island Dock* and *California Dump Truck Owners*. Furthermore, the Fund's brief has brought to the attention of the Arbitrator no Board or court decision which squarely holds that a supplier such as the Employer must be deemed to not be in the building and construction industry, and the Arbitrator's own research has uncovered no such decision. On the contrary, the Arbitrator is of the opinion that if the Board were faced with a case identical to

---

37. *Id.* at 815 quoting from H.R. Rep. No. 1147, 86 Cong., 1st Sess. 39, *reprinted in* 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 943 (1959).

the present one, it would find the Employer to be in the building and construction industry.

But before addressing that question it is necessary to point out that the Board's treatment of NLRA § 8(f) exception cases evidences another reason that that section and not NLRA § 8(e) should be looked toward for guidance in interpreting ERISA § 4203(b). As pointed out above, Congress' rationale for enacting the building and construction industry exception to withdrawal liability rests in large part on the nature of labor available in those industries, that is, that an individual employee may typically work for many different employers during his or her career, and on the premise that the funding base of a plan is the construction projects in the area covered by the collective bargaining agreements through which the plan is maintained and that that funding base will not be unduly threatened so long as contributions are made for whatever work is done in the area. The Board has repeatedly cited similar concerns in applying NLRA § 8(f). In *Zidell Explorations* the Board wrote:

> At the outset we note that the Section 8(f) prehire exemption was enacted for two reasons. First, Congress recognized that a building contractor had to know what his labor cost would be before he could proceed to make the necessary estimates upon which his bid would be based and, second, employers in the construction industry needed an available supply of various types of skilled craftsmen ready for immediate referral to the job site.[38]

In *Construction, Building Materials & Misc. Drivers, Local No. 83 (Matuszak)* the Board wrote regarding NLRA § 8(f):

---

38. Zidell Explorations, Inc., 175 NLRB 887, 889 (1969) (footnote omitted).

> Enacting the section, Congress recognized that the occasional nature of employment in the industry gave rise to unique needs. One such need was the employer's ability to "have available a supply of skilled craftsmen ready for quick referral."[39]

In *Forest City/Dillon-Tecon Pacific* the Administrative Law Judge whose rulings, findings and conclusions the Board adopted wrote regarding NLRA § 8(f):

> There is no question that the intention of the legislature was to deal with the special problems of obtaining help in an industry where the workers either did not work for the same employer and where normally they would work at a jobsite for a variety of different employers on different projects of relatively short duration or at least if they worked for the same employer such would be at a jobsite on numerous projects, each of relatively short duration. It was necessary to have a source of help, usually through trade unions in order to carry out this objective and as part thereof for the employer to assure that he could obtain the necessary help and know the approximate cost thereof. It is also necessary that an employer be able to obtain help through specified sources so as to complete a project within a specified time.[40]

In summary, in view of Congress' having elected to phrase the building and construction industry exception

---

39. Construction, Building Materials & Misc. Drivers, Local No. 83 (Matuszak), 249 NLRB 328, 330-31 (1979) (quoting H.R. Rep. 741, 86 Cong., 1st Sess. , *reprinted in* 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 759, 777-78 (1959).

40. Forest City/Dillon-Tecon Pacific, 209 NLRB 867, 871 (1974), *enforced* 522 F.2d 1107 (9th Cir. 1975).

set out in ERISA § 4203(b) as relating to the "building and construction industry" and in view of the similarities of concerns underlying that exception and the building and construction industry exception in NLRA § 8(f) the Arbitrator finds that in applying ERISA § 4203(b) he should be guided by decisions interpreting NLRA § 8(f).

In *Matuszak* the Board noted that it had denied NLRA § 8(f) exemptions to two classes of employers: (1) employers whose businesses involved the manufacture of construction materials which were installed by employees of a different employer and (2) employers who have only a minimal involvement in the construction process. It is undisputed that the Employer was not in any way, shape or form involved in the manufacture of the materials it sold. Cases denying NLRA § 8(f) exemptions to manufacturers of construction materials installed by employees of different employers are therefore factually distinguishable.[41] And the Employer's involvement in the construction process was not minimal but rather was most substantial.

It is undisputed, of course, that the Employer's employees were never physically engaged in the application of any of the Employer's products to a road surface.[42] Nonetheless, as found by the Arbitrator above, in the majority of situations the Employer's employees delivered the Employer's products to road construction job sites and, on occasion, they had to off-load product in a piecemeal fashion in order that it could be "shot off" to a road under construction or repair. More importantly, when the Em-

---

41. *See e.g.* NLRB v. W.L. Rives Co., 328 F.2d 464 (5th Cir. 1964); Hoover, Inc., 240 NLRB 593 (1979); Forest City/Dillon-Tecon Pacific, *supra* footnote 40.

42. *Cf.* Carpet, Linoleum and Soft Tile Local Union No. 1247 (Indio Paint), 156 NLRB 951 (1966).

ployer's operation is viewed as a whole, it is clear that that operation was related solely and exclusively to the road construction industry and was subject to virtually all of the building and construction problems which NLRA § 8(f) was meant to resolve. The Employer sold product only to persons or organizations engaged in road construction or repair; it sold to no other persons or organizations. The Employer's business cycle and daily operations were controlled by the very same factors which controlled road construction. When weather was too cold or too wet to apply a particular material the Employer could not deliver that material or, to paraphrase one witness' testimony, when the contractors couldn't work, the Employer couldn't work. Like construction contractors for whom NLRA § 8(f) was intended, the Employer obtained virtually all of its work by bidding; it therefore needed to know its labor cost in advance. Because of the fluctuation in its business cycle and as found in the Findings of Fact, the number of persons employed by the Employer and the number of hours worked by those employees varied dramatically according to seasons wherein road construction could or could not be done. When the Employer's business approached its seasonal maximums, the Employer needed a readily available source of Drivers to deliver its products, and the Employer sought the help of the Union to obtain those employees. Also like the construction employers for whom NLRA § 8(f) was intended, all of the Employer's employees worked on many projects and at least some of them worked not only for the Employer but for other employers as well. Finally, the Employer had even agreed with the Union to make a contribution to a fund to promote the construction industry. In summary, when the Employer's operation is viewed as a whole, it is clear that the Employer and its

employees were deeply involved in the road construction industry.

Board and judicial decisions wherein NLRA § 8(f) exemptions have been denied to employers are factually distinguishable. The employer in *Frick Co.*[43] derived less than 1% of its income from installation of refrigeration equipment. The remainder of its income was derived from manufacturing operations. The Employer, on the other hand, derived all of its income from sales of products to persons or organizations constructing or repairing roads. As indicated above, road construction and repair was not a minuscule portion of the Employer's business; road construction and repair was all of the Employer's business.

The employer in *Forest City/Dillon-Tecon Pacific, supra,* was engaged in a manufacturing process at a fixed plant. Its employees enjoyed regular employment, did not work for their employer on different projects, and did not visit construction job sites. The Employer's employees, on the other hand, did not work in any fixed location except to pick up bills of lading and load their trucks, went to a job site with respect to every order delivered, worked for the Employer at many different projects, and worked seasonally.[44]

The collective bargaining agreements signed by the various employers in *Matuszak, supra,* did not relate to

---

43. 141 NLRB 1204 (1963).

44. It is not necessary to discuss the Ninth Circuit's *per curiam* opinion which enforced the Board's order in Forest City/Dillon-Tecon Pacific. The court merely noted that there was substantial evidence on the record as a whole to support the Board's finding that an NLRA § 8(f) exemption was not available.

wage rates paid employees working at construction job sites. The operations of the employers covered by the collective bargaining agreements at issue in the decision related to manufacturing and warehousing. The Employer's operations, of course, involved neither warehousing nor manufacturing, and the wage rates provided for in the 1979 Agreement were applicable to work performed at job sites.

The Employer in *Hudson River Aggregates, Inc.*[45] was engaged in quarrying, crushing and stone sale operations. The Administrative Law Judge whose rulings, findings and conclusions the Board affirmed noted that that employer's employees were engaged "exclusively in mining and processing, and the on-premises cartage of unfinished and processed stone" and that the employer "functions through a stable work force on a stationary worksite, utilizing employees who seldom, if ever, even visit a construction jobsite."[46] The Employer's employees were not, of course, engaged in mining and/or processing and routinely made deliveries to construction job sites, and the Employer functioned through a changing and not a stable work force.

Neither the District Court's nor the Tenth Circuit's opinions in *Mo-Kan Teamsters Pension Fund v. Creason*, *supra* footnote 21, provide much factual information relevant to the NLRA § 8(f) issue. It is clear that Creason did business in Missouri and Kansas and "was engaged

---

45. 246 NLRB 192, *enforced* 639 F.2d 865 (2d Cir. 1981). The Second Circuit's only reference to the NLRA § 8(f) issue in enforcing the Board's order was to specifically affirm the Board's determination that premature recognition of a specific union violated NLRA §§ 8(a)(1), (2), and (3).

46. *Id.* at 199.

in the trucking or cartage business, with employees driving over-the-road and performing millwright work" and that although Creason testified that his employees hauled material to construction sites, he further testified that they did not unload material at those sites. Unlike the Employer in the present case, the facts available do not suggest that Creason's business was intimately tied to the construction industry or any specific aspect of it. Furthermore, in view of the District Court's holding that the collective bargaining agreement involved in Creason was not a prehire agreement, the court's finding that Creason was not an employer in the building and construction industry may be *dictum.*

In summary, for the above reasons the Arbitrator finds that substantially all of the Employer's employees with respect to whom the Employer had an obligation to contribute to the Fund performed work in the building and construction industry at times pertinent to the present arbitration. In view of that finding and the stipulated fact that the Fund primarily covers employees in the building and construction industry and the finding that the Employer has not performed work within the jurisdiction of the 1979 Agreement of the type for which contributions were previously required to be made to the Fund and the finding that the Employer has not and likely will not resume such work within 5 years after December 21, 1982, the Arbitrator concludes that the Employer has shown by a preponderance of the evidence that in accordance with ERISA § 4203(b) that the Employer has not withdrawn from the Fund and that the Fund's determination to the contrary was clearly erroneous.

REMEDY

It is virtually self-evident that the Arbitrator must direct that the Fund reimburse the Employer for withdrawal liability payments previously made by the Employer to the Fund. In view of the nature of the claim it is also proper that the Arbitrator direct that the Fund pay the Employer interest on the amounts previously paid by the Employer to the Fund. The Arbitrator will therefore direct interest on said payments and will direct that the rate of interest be that effective in accordance with § 6621 of the Internal Revenue Code.

ERISA § 4221(a)(2) provides in part that if the parties have not provided by agreement for the costs of the arbitration including arbitrator's fees the Arbitrator shall assess such fees and that the Arbitrator may also award reasonable attorney's fees. Section 51 of the IFEBP/AAA Rules provides that the expenses of witnesses for either side shall be paid by the party producing such witnesses and that the cost of the stenographic record, if any, and all transcripts thereof shall be prorated equally among the parties unless they shall otherwise agree. Section 51 further provides that all other expenses of the arbitration "shall be borne equally by the parties, unless they agree otherwise, or unless the Arbitrator, in the Award, assesses such expenses or any part thereof against any specified party or parties." Neither the Fund nor the Employer has submitted any evidence to the Arbitrator which is probative of any agreement between the Employer and Fund regarding assessment of expenses and/or attorney's fees. Despite the Arbitrator's having found in favor of the Employer in the instant case, the Arbitrator is not persuaded that the Fund's claim that the Employer owed withdrawal liability was made in bad

faith or constituted arbitrary, capricious, unreasonable and/or baseless conduct. The Arbitrator will therefore deny the Employer's request for attorney's fees and will direct that the parties each pay one-half of the expenses of the arbitration specifically including but not limited to the Arbitrator's fee and expenses. The Arbitrator notes that although the PBGC's final rules regarding arbitration do not apply to the instant arbitration, the Arbitrator's decisions regarding expenses and attorney's fees are consistent with those rules.[47]

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case, and in light of the foregoing Findings of Fact and Conclusions the Arbitrator directs the Fund to reimburse the Employer the sums previously paid the Fund by the Employer as installment payments on the withdrawal liability claimed by the Fund with interest from the date such payments were received by the Fund to the date said reimbursements are made by the Fund at a rate effective in accordance with Section 6621 of the Internal Revenue Code.

The Arbitrator directs the Fund and the Employer to each pay the cost of its own witnesses. The Arbitrator directs the Fund and the Employer to each pay one-half of the costs of the stenographic record directly to the reporting agency. The Arbitrator directs the Fund and the Employer to each pay one-half of all other expenses of the arbitration including the Arbitrator's fees and expenses and the administrative fees of the American Arbi-

---

47. *See* amendment to 29 C.F.R. Part 2641, 50 Fed. Reg. 34683, 34686 (1985) (to be codified at 29 C.F.R. §§ 2641.9, 2641.13(b)(5)).

tration Association. If one party shall have already paid the administrative fees of the American Arbitration Association, the other party shall reimburse the paying party for one-half of said fees.

DATED: April 24, 1986

/s/ Jack Clarke
Jack Clarke, Arbitrator
P.O. Box 3151
Tuscaloosa, AL 35404-3151
Phone (205) 556-7651
File #1984-509

STATE OF ALABAMA
COUNTY OF TUSCALOOSA

On this the 24th day of April 1986, before me personally appeared Jack Clarke to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

/s/ (Illegible)

Notary Public,
State of Alabama at Large

(Filed August 21, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 86-0657-CV-W-0

UNION ASPHALTS AND ROADOILS, INC., et al,
Plaintiffs,

v.

MO-KAN TEAMSTERS PENSION FUND, et al,
Defendants.

No. 86-0658-CV-W-0

MO-KAN TEAMSTERS PENSION FUND, et al,
Plaintiffs,

v.

UNION ASPHALTS AND ROADOILS, INC., et al,
Defendants.

ORDER

This matter raises the question whether employees of Union Asphalts and Roadoils, Inc. ("Union Asphalts") performed work in the "building and construction industry," as that phrase is used in §1383(b) of the Multi-Employer Pension Plan Amendments Act of 1980

("MPPAA"), 29 U.S.C. §1381 et seq. *amending* The Employee Retirement Incon Security Act ("ERISA"), 29 U.S.C. §1001 et seq.[1]

Union Asphalts made contributions to the Mo-Kan Teamsters Pension Fund ("Fund"), a multi-employer pension plan under ERISA, for the benefit of its teamster employees pursuant to a collective bargaining agreement between Union Asphalts and Local Union No. 541, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Union"). When Union Asphalts went out of business, trustees of the Fund assessed "withdrawal liability," (discussed in more detail below) against Union Asphalts pursuant to MPPAA §1381. Union Asphalts contested the assessment and filed for arbitration pursuant to MPPAA §1401(a). After a two-day evidentiary hearing the arbitrator held that the Fund's assessment of withdrawal liability was clearly erroneous and ordered the Fund to return Union Asphalt's withdrawal payments, plus interest. The arbitrator's result was dictated by his holding that Union Asphalts performed work in the "building and construction industry," which effectively exempted Union Asphalts from withdrawal liability to the Fund under MPPAA §1383(b).

The Fund refused to comply with the arbitrator's award. On May 22, 1986, Union Asphalts filed an action pursuant to MPPAA §1401(b)(2) to enforce the award (No. 86-0657-CV-W-0). On the same date the Fund also filed an action under the same statutory provision requesting the court to vacate the arbitrator's award (No.

---

1. The MPPAA was enacted September 26, 1980, Pub. L. 96-364, Title I, §104(2), 94 Stat. 1218, as §4203 of ERISA, Pub. L. 93-406, Title IV, §4203. MPPAA citations herein are to its provisions as numbered in the *United States Code*.

86-0658-CV-W-0). Pending before the court are cross-motions for summary judgment in both actions, supported by a full transcript of the arbitration hearing, exhibits entered at the hearing and the arbitrator's opinion. For the reasons stated below, the court concludes that the arbitrator erred in finding that Union Asphalts performed work in the "building and construction industry" and grants summary judgment in favor of the Fund in both actions.

I.

Under MPPAA §1401(c), an arbitrator's findings of fact are presumed to be correct unless the party challenging a finding demonstrates by a clear preponderance of the evidence that it was incorrect.[2] 29 U.S.C. §1401(c). The Fund challenges many of the arbitrator's factual findings. Upon a careful review of the record, however, the court concludes that none of the arbitrator's challenged findings of fact are demonstrably incorrect by the clear preponderance of the evidence.[3] What follows is essentially a summary of the arbitrator's findings.

---

2. Union Asphalts argues that the court also should defer to the arbitrator's legal conclusions. This matter presents a problem of statutory construction, however, which this court must resolve for itself, without deferring to the arbitrator's view. *See, e.g., Meat Cutters Local 88 Pension Plan v. Del Monte Supermarkets,* 565 F. Supp. 27, 29 (E.D. Mo. 1983), *vacated upon parties' motion,* 4 E.B.C. 2168 (8th Cir. 1983); *T.I.M.E.-DC v. Management-Labor, Welfare and Pension Funds,* 756 F.2d 939, 945 (2d Cir. 1985).

3. On page 36 of his opinion, the arbitrator stated that Union Asphalts employees "went to a job site with respect to every order delivered." This statement is clearly incorrect, but it appears to have been only an inadvertent slip - earlier in his opinion the arbitrator found that Union Asphalts employees delivered material to job sites in a bare "majority of situations." The arbitrator also stated elsewhere that Union Asphalts worked "on" or "at" many projects. The court does not read these statements to imply anything more than that Union Ashpalts delivered material "to" many different projects.

In the 1940's Union Asphalts began selling roadoils and asphalt materials obtained from the Kansas City, Kansas Refinery of the Phillips Petroleum Co. Union Asphalts was the exclusive seller of those materials from the Phillips plant and sold them in Kansas, Missouri, Iowa and Nebraska. The company usually delivered its products with its own tank trucks driven by its own employees, but occasionally made deliveries by common carrier.

Union Asphalts and the Union entered into a series of collective bargaining agreements recognizing the Union as the exclusive bargaining agent for the company's employees. Under the agreements, Union Asphalts was required to pay specified amounts into a designated pension fund, which was the Fund under the 1979 agreement.[4] Union Asphalts and the Union did not enter into a "hiring hall" arrangement, but when Union Asphalts needed drivers in excess of those it could obtain by recalling laid-off drivers (in order of seniority under the collective bargaining agreement), Union Asphalts turned to the Union. When laid off, some of the Union Asphalts drivers returned to other jobs while others went to the Union hall to seek additional work.

Union Asphalts' products were used exclusively in road construction and repair, and could not be applied in wet or cold weather. Consequently, its business and the numbers it employed fluctuated with the seasons, and with more general economic cycles in the road construction industry.

A Union Asphalts driver's typical workday began when he picked up a bill of lading at the company's

---

4. Under the collective bargaining agreement Union Asphalts also contributed money to a "Building Industry Advancement Fund" created to "advance and promote the building industry."

office near the Phillips plant. At Phillips the driver would have asphalt or other material pumped into his truck, then deliver the material to its destination, usually a job site, although material was also delivered to off-site asphalt plants. At the points of delivery drivers usually discharged their loads into holding tanks. Occasionally a driver discharged roadoils piecemeal into a spreader at a job site which would return for several reloadings after "shooting off" its limited capacity. In discharging their tank trucks drivers operated only equipment on their trucks or tractors. Union Asphalt employees did not apply roadoil or asphalt to any highway, or in any other way engage in actual road construction or repair at the job sites to which they delivered their loads.

The Phillips Refinery closed in June 1982, forcing Union Asphalts out of business. Union Asphalts paid the Fund withdrawal liability in the amount of $134,380, while retaining the right to object to the Fund's assessment.

II.

Under MPPAA §1381, when an employer withdraws from a multi-employer pension plan, it incurs a debt to the plan known as "withdrawal liability." 29 U.S.C. §1381(a). Congress passed §1381 to combat the incentive for early withdrawal previously present in multi-employer pension plans under ERISA, where a withdrawing employer's liability was contingent on the plan's termination within five years of the withdrawal. *See generally Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1029-34 (N.D. Ill. 1982), *aff'd* 724 F.2d 1247 (7th Cir.), *cert. denied*, ... U.S. ....., 82 L.Ed.2d 855 (1984).

In passing MPPAA §1381, however, Congress recognized that withdrawals from multi-employer pension plans in certain industries would not usually endanger the health of a plan. Among those industries was the building and construction industry:

> In the construction industry, the funding base of the plan is the construction projects in the area covered by the collective bargaining agreements through which the plan is maintained. An individual employee will typically work for tens or even hundreds of different employers over his or her working career, and the volume of work for a given employer will often fluctuate greatly from year to year. These normal events do not pose an undue threat to a plan as long as contributions are made for whatever work is done in the area. Therefore, the construction industry exception is designed to impose liability only on former contributors that continue to work within the plan's area. It exempts from liability employers that cease contributions because they have no work in the area; there is no liability when a company goes out of business, is sold, or is simply without work for a time. Also, under this exception, an employer who comes into an area to do one project and then leaves would not be subject to liability.

H.R. Rep. No. 869 Part I, 96th Cong., 2d Sess. 75-76, *reprinted in* 1980 U.S. Code Cong. & Admin. News, 2943-44. Based on this recognition Congress included § 1383 (b) in the MPPAA, which effectively exempts employers from withdrawal liability if: (1) substantially all the employees with respect to whom the employer has an obligation to contribute under a plan perform work in the "building and construction industry;" (2) the plan

primarily covers employees in the "building and construction industry;" (3) the employer ceases to have an obligation to contribute under the plan; and (4) the employer does not perform its former work within the jurisdiction of the collective bargaining agreement which required it to contribute to the plan, or resume such work without renewing its obligation to the plan.

The parties have stipulated that the Fund primarily covers employees in the building and construction industry. It is undisputed that Union Asphalts ceased to have an obligation to contribute to the plan after December 31, 1982, that Union Asphalts has not continued to perform its former work within the jurisdiction of its collective bargaining agreement with the Union, and that there is no expectancy that it will resume such work. Consequently, Union Asphalts' withdrawal liability hinges on whether its drivers performed work in the "building and construction industry."[5]

As noted by the arbitrator, the phrase "building and construction industry" is not defined in ERISA, as amended by the MPPAA. The legislative history of the MPPAA, however, sheds light on the intended meaning of the phrase. The House of Representatives Committee that studied the MPPAA remarked in its report: "In applying this exception, the Committee intends that the term 'building and construction industry' be given the same meaning as has been developed in administration of the Taft-Hartley Act." H.R. Rep. No. 96-869 Part 1, 96th Cong., 2d Sess. 75-76, *reprinted in* 1980 U.S. Code

---

5. The parties have stipulated that the Fund primarily covers employees involved in the building and construction industry. It also appears undisputed that "substantially all" of Union Asphalt's employees were the drivers whose daily routine is outlined above in the text.

Cong. & Admin. News, 2944. In discussing S. 1076, a bill that contained an exception from withdrawal liability for the building and construction industry virtually identical to that eventually contained in the MPPAA, the Senate Committee on Labor and Human Resources wrote: "The PBGC [Pension Benefit Guaranty Corporation] and plan sponsor should refer to Labor-Management Relations law for guidance in defining "building and construction industry." Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. The Multi-Employer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, (Comm. Print, April 1980). In light of these comments, the arbitrator ruled that the question whether Union Asphalts' employees worked in the "building and construction industry" under the MPPAA would be answered by turning to case law construing §8(f) of the Taft-Hartley Act, 29 U.S.C. §158(f), which exempts employers "engaged primarily in the building and construction industry," from that Act's prohibition against pre-hire agreements.[6]

---

6. Although not raised in the briefs filed in connection with the pending cross-motions, the court has considered the proposition (rejected by the arbitrator) that the legislative history of the MPPAA itself provides a test for defining the breadth of §1383(b). Rather than following the approach adopted by the court, a more structural test would be followed that would exempt a company from withdrawal liability if: (1) the company ceased to have an obligation to contribute to a plan and performed no further covered work; (2) its employees were engaged in construction work, broadly described; (3) its employment level fluctuated; (4) pension contributions for construction workers - again broadly defined - continued to be made in the area; and (5) the funding of the plan at issue was not seriously hurt by the withdrawal.

Rather than remand the case for taking additional evidence, the court rejects such an approach in light of: (1) Congress' specific reference to the Taft-Hartley Act; and (2) the court's opinion that in §1383(f) Congress expressed the view that if the narrow terms of §1383(b) are to be expanded based on a company's employment structure, that should be accomplished by the agency charged with administering the MPPAA.

The Fund argues that the arbitrator erred in disregarding cases construing §8(e) of the Taft-Hartley Act, 29 U.S.C. §158(e), which prohibits "hot cargo" agreements except those "between a labor organization and an employer in the construction industry relating to the contracting or sub-contracting of work to be done at the site of construction . . . ," and that the arbitrator also erred in disregarding regulations directed to "construction industry employers" under the Davis-Bacon Act. 40 U.S.C. §§ 276a-276a-5, which relates to wage and hour standards for construction companies involved in federally funded construction work. *See* Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction, 29 C.F.R. § 5.2(i), (j) and (l) (1986).

The court accepts the arbitrator's finding, however, that neither §8(e) cases, nor Davis-Bacon regulations illuminate the terms of the MPPAA. Initially, as pointed out by Union Asphalts, § 8(e) contains the term "construction industry," rather than "building and construction industry," as found both in § 8(f) and MPPAA § 1383(b). Further, the narrow concern of job-site friction between union and non-union employees addressed by §8(e), *see, e.g., Joint Council of Teamsters No. 42 and Associated General Contractors (California Dump Truck Owners)*, 248 N.L.R.B. 808, 815 (1980), bears too little resemblance to the rationale (quoted-above) underlying MPPAA §1383(b) to inform its construction. The wage and hour concerns addressed by the Davis-Bacon Act also have little connection with the focus of MPPAA §1383(b). Moreover, no Davis-Bacon regulation defining the specific phrase at issue in this action has been called to the court's attention. Finally, the § 8(e) cases and Davis-Bacon materials cited to the court have more to

do with defining the parameters of job site work, a prerequisite for coverage by both those statutes, than with defining "building and construction industry," or any similar term. *See, e.g., California Dump Truck Owners, supra; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 294 (Island Dock Lumber, Inc.)*, 145 N.L.R.B. 484, 491 (1963); *Joint Council of Teamsters No. 42, et al. (Inland Concrete)*, 225 N.L.R.B. 209, 216-17 (1976); *see also* 29 C.F.R. §5.2; *North Santiam Paving Co.*, B-215023, 85-1 Comp. Gen. 291 (March 11, 1985) (contrasting independent materialmen delivering to jobsite, who were not subject to Davis-Bacon coverage, with employees of general contractor who haul material from commercial sources for use at construction site, who are covered).

The Fund argues that the ultimate goal of Taft-Hartley §8(f) is no more similar to that of MPPAA §1383(b) than are the aims of Taft-Hartley §8(e) or the Davis-Bacon Act. The court agrees with the arbitrator's reasoning, however, that since Congress responded to identical aspects of the structure of the building and construction industry in enacting §8(f) and MPPAA §1383(b), cases construing the scope of §8(f) are most helpful to the present task.[7]

The court accepts the Fund's final argument, however, that the arbitrator erred in finding that case law

---

7. In passing §8(f) Congress recognized that the shifting and occasional nature of employment in the building and construction industry gave rise to "unique needs" requiring prehiring agreements to be legal. *See, e.g., Construction, Building Materials and Miscellaneous Drivers Local No. 83*, 243 N.L.R.B. 328, 330-31 (1979) *quoting* H.R. Rep. 741, 1st Sess., *reprinted in* 1 N.L.R.B. Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 759, 777-78 (1959); *Forest City/Dillon-Tecon Pacific*, 209 N.L.R.B. 867, 871 (1974) *enforced* 522 F.2d 1107 (9th Cir. 1975).

under Taft-Hartley §8(f) leads to the conclusion that Union Asphalts performed work in the "building and construction industry." The first court to construe §8(f) held that a company engaged in manufacturing and fabricating stainless steel pipe to order, but which did no jobsite installation of the pipe, was not in the "building and construction industry." *N.L.R.B. v. W. L. Rives & Co.*, 328 F.2d 464, 469 (5th Cir. 1964). Earlier, the National Labor Relations Board ("NLRB") held that a refrigeration equipment manufacturing company which derived only a negligible part of its income from "actual installation of refrigeration equipment" was not in the building and construction industry. *Frick Co. and Plumbers and Steamfitters Local No. 52,* 141 N.L.R.B. 1204. 1208 (1963). Jobsite involvement in fabrication, construction or installation of materials or structures was of primary importance in subsequent §8(f) cases, both in the courts and before the N.L.R.B. *See, e.g., Carpet, Linoleum & Soft Tile Local Union No. 1247* (*"Indio Paint"*), 156 N.L.R.B. 951, 959 (1966) (stating that the "building and construction concept subsumes *the provision of labor whereby materials and constitutent parts may be combined on the building site to form, make or build a structure;*" and holding that a firm deriving most of its revenues from floor covering *installations* (as opposed to merely provision of materials) was engaged in the "building and construction industry") (emphasis in original); *Zidel Explorations, Inc.*, 175 N.L.R.B. 887, 889 (1969) (company's "entirely separate operation at [a] missile site" entitled it to §8(f) exception, despite other non-construction projects because company "frequently engaged in transitory on-site operations in the construction industry similar to those performed at the missile site . . . ."); *Hoover, Inc.*, 240 N.L.R.B. 593, 599 n.17

(1979) (although employer not primarily engaged in construction work on site in issue, at other sites employer was so engaged, and was entitled to effectuate §8(f) agreements at those locations); *Construction, Building Materials & Miscellaneous Drivers Local No. 83*, 243 N.L.R.B. 328, 331-32 (1979) (employers doing only occasional work at construction sites, and operating under wage agreements concerning work done only off-site, such as plant operations and deliveries made from plants, not covered by §8(f)); *Operating Engineers Pension Trust v. Beck Engineering and Surveying*, 746 F.2d 557, 562-63 (9th Cir. 1984) (employer involved in building and construction industry when "90% of its surveying work [was] related to proposed and ongoing construction projects and [was] performed in large part at the job site"); *Mo-Kan Teamsters Pension Fund v. Creason*, No. 76-228-C2, slip op. at 8-9 (D. Kan. April 16, 1981), *aff'd.* 716 F.2d 772 (10th Cir. 1983) (company whose employees hauled steel to construction sites, but did not unload materials, not engaged in on-site construction, and therefore not covered by §8(f)).[8]

Union Asphalts' lack of involvement in job-site construction imparts serious doubts, therefore, as to their

---

8. The arbitrator distinguished several of the cases which emphasize an employer's lack of on-site involvement in construction from the instant matter, stating that, unlike the employers in those cases, Union Asphalts was not a "manufacturer" of the asphalt and related materials that it sold and delivered to construction sites. The court disagrees, however, finding Union Asphalts' status as a middleman material seller to be incidental to the point - *viz.*, that a company performing little or no on-site work is not involved in the "building and construction industry," unless it is otherwise substantially involved in building and construction projects. Despite a company's status as a "manufacturer" of materials, for example, if that company also installs those materials at job sites, §8(f) applies. *See Rives, supra* (emphasizing job-site installation by others than employer); *Indio Paint, supra* (seller of carpet and other materials, who installed those materials as well, covered by §8(f)).

status as an employer in the "building and construction industry." A finding that an employer engaged in no job-site work, however, is not necessarily dispositive of the §8(f) inquiry. As explained in *A. L. Adams Construction Co. v. Georgia Power Co.*, 773 F.2d 853 (11th Cir. 1984), where it was argued that an employer's workers must actually perform on-site construction to come within §8(f): "if [this] argument should prevail, some general contractors, which are primarily involved in the construction industry, could never qualify under §8(f)." *Id.* at 854. Of course, Union Asphalts' involvement in any construction project to which it delivered materials - even those where it "shot off" roadoil piecemeal at job sites - falls far short of a general contractor's involvement in a construction project. No case has been called to the court's attention where a company's involvement in on-site construction at any project was as minimal as was Union Asphalts' where Taft-Hartley §8(f) was held to apply. Union Asphalts' employees were not skilled craftsmen of the type generally associated with building and construction activities, but were ordinary truck drivers; they did not work alongside construction workers at jobsites applying asphalt or roadoil, but only supplied those materials; the greater part of a Union Asphalts' driver's typical day was not even spent at a construction project at all.

In taking the contrary view, the arbitrator noted that Union Asphalts sold materials only to companies or persons engaged in road construction and repair, and emphasized the fact that Union Asphalts' daily and seasonal work cycles - and hence its employment level - fluctuated along with those of the companies to whom Union Asphalts sold materials, which were indisputedly engaged

in the "building and construction industry."[9] The court agrees with the Fund that the arbitrator found Union Asphalts to be "in" the construction industry because its business was closely "tied" to that industry. The mere fact that Union Asphalts sold materials solely to construction companies for use in construction projects does not warrant an inference that the company was involved in the "building construction industry" under Taft-Hartley §8(f). *See Forest City/Dillon-Tecon*, 209 N.L.R.B. at 870-71; *Hudson River Aggregates, Inc.*, 246 N.L.R.B. 192, 199 (1979), *enforced* 639 F.2d 685 (2d Cir. 1981). And while, unlike the employers' work forces in *Forest City* and *Hudson River*, Union Asphalts' employment force was not stable, but fluctuated with the seasons, and though Union Asphalts turned to the Union to supply additional drivers when needed, the mere resemblance between Union Asphalts' work force and those of companies Congress meant to include within the "building and construction industry" exception to withdrawal liability provides no license for enlarging the scope of §1383(b). Congress foresaw the possibility that in various instances the literal terms of §1383(b) would not include a company within its ambit when, by reason of that company's similarities in employment structure to those companies involved in the building and construction industry, entertainment industry and trucking industry (industries specifically exempted by §1383), the section ought to apply. The MPPAA contains a mech-

9. The arbitrator also relied on the provision in Union Asphalts' collective bargaining agreement with the Union to contribute to a "building industry advancement fund" in reaching his conclusion. *See* footnote 4, *infra* [sic]. Union Asphalts' close connection to those involved in road construction would have provided ample incentive to promote that industry, however. Under such circumstances the court finds this term of the collective bargaining agreement to be of little value in deciding the question of statutory construction at hand.

anism for including such companies within its withdrawal liability exemption, however. *See* 29 U.S.C. §1383(f).

MPPAA §1383(b) is an exception to withdraw liability that is normally imposed on a company withdrawing from a multi-employer pension plan; as such, the provision should be construed narrowly. *Frick Co.*, 141 N.L.R.B. at 1208. In light of this well-recognized principle of statutory construction, and the court's conclusion that construction of §1383(b) should be guided by case law under Taft-Hartley §8(f), the court finds that Union Asphalts' work relating to building and construction projects was not such to bring it within the terms of §1383 (b). Accordingly, it is

ORDERED summary judgment is granted in favor of the Mo-Kan Teamsters Pension Fund and against Union Asphalts and Roadoils, Inc., in both No. 86-0657-CV-W-0 and No. 86-0658-CV-W-0, as the court finds that Union Asphalts was subject to withdrawal liability under MPPAA §1381, et seq.; it is further

ORDERED this matter is remanded to the arbitrator for a determination of Union Asphalts and Roadoils Inc.'s withdrawal liability under the MPPAA as applied to non-construction and building industry employers; it is further

ORDERED that Union Asphalts and Roadoils, Inc. shall make installment payments of withdrawal liability to the Fund during the pendency of this action and any further arbitration proceedings; it is further

ORDERED each party shall bear its own costs and attorney fees incurred herein.

/s/ Elmo B. Hunter
Elmo B. Hunter
Senior United States District Judge

Dated: August 21, 1987.

(Filed September 30, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2307

Union Asphalts and Roadoils, Inc.; Patricia M. Lorenz; David M. Lorenz; David Dill,
Appellants,

v.

MO-KAN Teamsters Pension Fund; Karl Rogers, Trustee; Richard Milone, Trustee; Robert Gillihan, Trustee; Gayle D. Starling, Trustee; James Duvall, Trustee; Richard Knipp, Trustee; Frank J. Mobley, Trustee; William W. Weeks; American Benefit Plan Administration, Inc.,
Appellees.

MO-KAN Teamsters Pension Fund; Karl Rogers; Richard Milone; Robert Gillihan; Gayle D. Starling; Michael Rogers; James Duvall; Richard Knipp; Leo Zahner, III; and William W. Weeks, Trustees of the MO-KAN Teamsters Pension Fund,
Appellees,

v.

Union Asphalts and Roadoils, Inc.; Patricia M. Lorenz; David M. Lorenz; David Dill,
Appellants.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: May 11, 1988
Filed: September 30, 1988

Before FAGG and WOLLMAN, Circuit Judges, and RE,* Chief Judge.

FAGG, Circuit Judge.

Union Asphalts and Roadoils, Inc. (UA) appeals from the district court's order granting summary judgment in favor of MO-KAN Teamsters Pension Fund (Fund), a multiemployer pension plan. The district court held UA was subject to withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA or the Act), Pub. L. No. 96-364, 94 Stat. 1208 (codified at scattered sections in 5, 26, and 29 U.S.C.). We affirm.

Until 1982, UA distributed road oils and asphalt materials to contractors and governmental agencies involved in road construction and repair. UA employees delivered these materials in UA trucks to the buyer's job site or storage area. Occasionally, UA delivered its product to the buyer by common carrier. In 1982, the refinery that supplied UA closed. UA was unable to find an alternate supplier and, consequently, went out of business.

While UA was in operation, its employees were members of Local Union No. 541, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Independent (Union). As required by the collective bargaining agreement between UA and the Union, UA made payments to the Fund

*The HONORABLE EDWARD D. RE, Chief Judge, United States Court of International Trade, sitting by designation.

to provide pension benefits for UA employees. When UA ceased operations, it stopped contributing to the Fund. Because the Fund believed UA had completely withdrawn from the plan, the Fund assessed withdrawal liability against UA under MPPAA, 29 U.S.C. §§ 1381(a), 1383(a). UA challenged the assessment and demanded arbitration under the Act. *See id.* § 1401(a)(1). In the interim, UA began making payments to the Fund. *See id.* § 1401(d).

After an evidentiary hearing, an arbitrator determined that UA had not withdrawn from the Fund because UA came within the building and construction industry exception of MPPAA, *id.* § 1383(b). Thus, the arbitrator ordered the Fund to return UA's previous payments.

The Fund filed a complaint in federal district court seeking to vacate the arbitrator's award; UA filed a complaint to enforce the award. *See id.* § 1401(b)(2). After careful review, the district court rejected the arbitrator's determination that UA came within the statutory exception for the building and construction industry. Thus, the court held UA subject to withdrawal liability. UA appeals.

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at scattered sections in 5, 18, 26, and 29 U.S.C.), to regulate private retirement pension plans. Because ERISA did not adequately protect multiemployer pension plans when employers terminated their participation in those plans, *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 722 (1984), Congress amended ERISA by enacting MPPAA. Under MPPAA, when an employer completely withdraws

from a multiemployer pension plan, that employer must pay a sum determined by the particular fund under guidelines set by Congress. *See* 29 U.S.C. §§ 1381, 1382, 1391. This payment, labeled as the withdrawal liability, *id.* § 1381, protects the financial stability of the plan. *See* H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1, at 67, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2935 (*Report*).

Under certain circumstances, however, the Act excuses employers in the building and construction industry from withdrawal liability. For example, an employer in the building and construction industry that goes out of business does not have to pay withdrawal liability to a multiemployer pension plan at that time. *Report*, *supra*, at 75-76, U.S. Code Cong. & Admin. News at 2943-44.

While section 1383(a) defines "complete withdrawal" for most employers, section 1383(b) defines complete withdrawal for an employer in the building and construction industry. Section 1383(b) provides:

> (1) Notwithstanding [section 1383(a)], in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if—
>
> > (A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and
> >
> > (B) the plan—
> >
> > > (i) primarily covers employees in the building and construction industry * * *.

> (2) A withdrawal occurs under this paragraph if—
>
> (A) an employer ceases to have an obligation to contribute under the plan, and
>
> (B) the employer—
>
> (i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or
>
> (ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

Id. § 1383(b)(1)-(2). In the present case, UA maintains that it comes within the statutory exception because UA is an employer "in the building and construction industry." *See id.* § 1383(b)(1). Thus, UA contends it is not subject to withdrawal liability.

The parties have stipulated that the Fund primarily covers employees in the building and construction industry. *See id.* § 1383(b)(1)(B)(i). Further, although UA no longer has an obligation to contribute to the Fund, *see id.* § 1383(b)(2)(A), UA also has ceased operations, *see id.* § 1383(b)(2)(B). Thus, the issue here is whether substantially all of the employees for which UA had an obligation to contribute had performed work in the building and construction industry. *See id.* § 1383(b)(1)(A). If so, UA did not completely withdraw as defined in section 1383(b) and is not subject to withdrawal liability. If the contrary is true, however, UA fails to come within the statutory exception and remains subject to withdrawal liability. *See id.* §§ 1381, 1383(a). We turn to examine this issue.

I. Standard of Review

MPPAA provides that any party may seek "to enforce, vacate, or modify the arbitrator's award" in federal district court. *Id.* § 1401(b)(2). On judicial review, the district court must accept the arbitrator's findings of fact as correct unless rebutted by a clear preponderance of the evidence. *Id.* § 1401(c). The district court in the present case found the Fund had not rebutted the presumption and thus accepted the arbitrator's factual findings.

The district court, however, indicated it was not bound by the arbitrator's legal interpretation of the statutory exception, and we agree. Under MPPAA, the district court has full review of the arbitrator's legal determinations. *See Trustees of the Amalgamated Ins. Fund v. Geltman Indus., Inc.*, 784 F.2d 926, 928-29 (9th Cir.), *cert. denied*, 107 S. Ct. 90 (1986); *Board of Trustees of the W. Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1405-06 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton Tri Indus.*, 727 F.2d 1204, 1207 n.7 (D.C. Cir. 1984) (*Stockton Tri Indus.*); *Republic Indus., Inc. v. Teamsters Joint Council No. 83 of Va. Pension Fund*, 718 F.2d 628, 641 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

UA argues that under MPPAA judicial review of the arbitrator's legal determinations should be severely limited. To support its contention, UA relies on *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), *aff'd by an equally divided court*, 107 S. Ct. 2171 (1987) (*United Retail*), *Washington Star Co. v. International Typographical Union Negotiated Pen-*

sion Plan, 729 F.2d 1502 (D.C. Cir. 1984), and a reference in section 1401(b)(3) to the Federal Arbitration Act (Arbitration Act), 9 U.S.C. §§ 1-14. We believe UA's reliance is misplaced.

In *United Retail* and *Washington Star Co.,* the courts did not review an arbitrator's legal determinations; instead, the courts dealt with constitutional issues involving MPPAA. *See United Retail,* 787 F.2d at 129; *Washington Star Co.,* 729 F.2d at 1503. We do not believe either decision can be characterized as designating a standard for review of the arbitrator's legal determinations. *See United Retail,* 787 F.2d at 135 n.9 (passing remark in a footnote); *Washington Star Co.,* 729 at 1505 (introductory outline of section 1401 that did not mention *Stockton Tri Industries,* 727 F.2d at 1207 n.7). Thus, although UA looks to *United Retail* and *Washington Star Co.* for support, the courts in those cases did not decide the current issue.

Finally, UA correctly points out that under the Arbitration Act, 9 U.S.C. § 10, the courts have extremely limited review of an arbitrator's legal determinations. *See Stroh Container Co. v. Delphi Indus., Inc.,* 783 F.2d 743, 751 (8th Cir.), *cert. denied,* 476 U.S. 1141 (1986). UA contends the Arbitration Act controls here.

Section 1401(b)(3) of MPPAA indicates the Arbitration Act, which governs voluntary arbitration, applies only to the extent it is consistent with MPPAA. *See* 29 U.S.C. § 1401(b)(3). We agree with the Fourth Circuit that "[t]he clear authorization of [section] 1401(b)(2) for judicial review 'to enforce, vacate, or modify the arbitrator's award' gives a right to review an arbitrator's legal rulings." *Republic Indus., Inc.,* 718 F.2d at 641. Thus, the severely limited review required by

section 10 of the Arbitration Act is inconsistent with section 1401(b)(2) of MPPAA, and the latter prevails. We conclude that on judicial review of an arbitrator's decision under MPPAA the courts may fully review the arbitrator's legal determinations.

II. Building and Construction Industry Exception

The term "building and construction industry" is not defined in MPPAA. Congress, in the legislative history, indicated this term should "be given the same meaning as has developed in the administration of the Taft-Hartley Act." *Report, supra,* at 76, 1980 U.S. Code Cong. & Admin. News at 2944; *see* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 14 (Comm. Print 1980). Like the district court and the arbitrator, we look to case law under section 8(f) of the Taft-Hartley Act, 29 U.S.C. § 158(f), which contains the same term. Section 8(f) is applicable to employers "engaged primarily in the building and construction industry." *Id.*

Initially, we note that under section 8(f) the term "building and construction industry" has been construed narrowly because, as in section 1383 of MPPAA, the term is part of a statutory exception. *See Frick Co.*, 141 N.L.R.B. 1204, 1208 (1963). The National Labor Relations Board has generally defined the term as "subsum[ing] the provision of labor whereby materials and constituent parts may be combined on the building site to form, make[,] or build a structure." *Carpet, Linoleum, and Soft Tile Local Union No. 1247,* 156 N.L.R.B. 951, 959 (1966) (*Indio Paint*) (emphasis omitted). Thus, employers who manufacture construction materials that

are installed by others at the construction site are not in the building and construction industry. *See, e.g., NLRB v. W.L. Rives Co.*, 328 F.2d 464, 469 (5th Cir. 1964) (manufacturer of pipes and fittings made to order but installed by others); *Forest City/Dillon-Tecon Pac.*, 209 N.L.R.B. 867, 868, 870-71 (1974) (manufacturer of precast concrete building products that does no work on job site), *enforced in part*, 522 F.2d 1107 (9th Cir. 1975). Similarly, employers who are involved in the construction process in only a minimal way are not in the building and construction industry. *See, e.g., Frick Co.*, 141 N.L.R.B. at 1208 (employer involved in manufacture and sale of refrigeration equipment with little time spent or revenue obtained from installation of that equipment); *see also Construction, Bldg. Materials & Miscellaneous Drivers, Local No. 83*, 243 N.L.R.B. 328, 331 (1979) (summarizing these rules).

The district court recognized that actual on-site work is not always required for an employer to be in the building and construction industry. *See A.L. Adams Constr. Co. v. Georgia Power Co.*, 733 F.2d 853, 857-58 (11th Cir. 1984). For example, a general contractor may subcontract the actual on-site work and only manage the project by overseeing and coordinating the work on the job site. *See id.* at 858. Even then, however, "a contractor's involvement in the construction must be more than negligible." *Id.* at 858 n.12. Thus, work or significant involvement on the construction site is an important indication that the employer is in the building and construction industry. *See, e.g., Operating Eng'rs Pension Trust v. Beck Eng'g & Surveying Co.*, 746 F.2d 557, 562-64 (9th Cir. 1984) (ninety percent of employer's surveying work done with regard to construction proj-

ects, and thus employer in building and construction industry); *Indio Paint*, 156 N.L.R.B. at 959 (ninety-three percent of gross revenue derived from providing labor and materials to install floor coverings on job site, and thus employer in building and construction industry).

Here, UA was merely a supplier. UA sold a product that another company refined, and still others applied or used. UA employees transported their employer's product from the refinery to the buyer's specified point of delivery, usually the job site. Once at the job site, UA employees discharged the road materials from their trucks to another tank or receiving vessel. The arbitrator specifically found that

> [i]n discharging their loads, [UA's] employees were responsible only for operating equipment[] on their trucks and tractors and doing paper work [indicating they had made delivery]; they did not engage in spreading road oil or asphalt on any highway or in any other way engage in actual road construction or repair.

After the UA truck drivers unloaded at the job site, they did not remain. Instead, they returned to the refinery, reloaded, and drove to the next delivery point, whether a job site or storage area. *See Forest City/Dillon-Tecon Pac.*, 209 N.L.R.B. at 871.

We have no argument with the arbitrator's finding that UA had some characteristics consistent with companies that are working in the building and construction industry. Nevertheless, MPPAA, 29 U.S.C. § 1383, and the Taft-Hartley Act, 29 U.S.C. § 158(f), require that work be in the building and construction industry, not just connected to that industry, *see Hoover, Inc.*, 240

N.L.R.B. 593, 599 (1979) (connection with the building and construction industry insufficient under section 8(f); the employer must be engaged in building and construction industry); *Forest City/Dillon-Tecon Pac.*, 209 N.L.R.B. at 870-71 (same).

III. Conclusion

In determining that UA came within the statutory exception, the arbitrator failed to give the term "building and construction industry" the same meaning that has been developed under the Taft-Hartley Act. The employer must be in the building and construction industry; it is not enough that the employer is tangentially connected to or affected by that industry. After a careful review of the applicable law, we conclude that UA employees did not perform work in the building and construction industry as required by 29 U.S.C. § 1383(b)(1)(A). Thus, the district court correctly held UA subject to withdrawal liability under the Act. We affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(November 21, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2307WM

Union Asphalts and Roadoils, Inc.,
Appellants,

vs.

MO-KAN Teamsters Pension Fund, et al.
Appellees.

Appeal from the United States District Court for the
Western District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

November 21, 1988

Order Entered at the Direction
of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals,
Eighth Circuit.